

No. 9748

United States

2

Circuit Court of Appeals

For the Ninth Circuit.

COUNTY OF ALAMEDA (a Body Corporate and
Politic, and a Political Subdivision of the State
of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 241 to 512

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division

FILED

APR - 9 1941

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Southern Division

[Title of District Court and Cause.]

SUPPLEMENTAL CONCLUSIONS OF LAW

As supplemental and additional conclusions of law from the facts heretofore found by the Court, the Court finds:

I.

The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge.

II.

The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

III.

Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge. [305]

IV.

The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by §31 of Article IV of the California Constitution.

V.

The contract between the County of Alameda and the United States does not violate §18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability ex-

ceeding in any year the income and revenue provided for such year.

VI.

The contract between the United States and the County of Alameda is not void for lack of mutuality.

VII.

The contract between the United States and the County of Alameda is not void for uncertainty.

VIII.

The Courts of the State of California had no jurisdiction to determine substantial rights of the United States in *County of Alameda vs. Ross*, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460.

.....
United States District Judge.

....., 1940.

[Endorsed]: Lodged August 2, 1940. [306]

[Title of District Court and Cause.]

DEFENDANT COUNTY OF ALAMEDA'S OBJECTIONS TO PLAINTIFF'S SUPPLEMENTAL CONCLUSIONS OF LAW

Now come the defendant, County of Alameda, and objects to each and every, all and singular of the allegations contained in plaintiff's proposed

Conclusions of Law and Supplemental and Additional Conclusions of Law on file herein.

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California

J. F. COAKLEY

Chief Assistant District Attorney
in and for the County of
Alameda, State of California

ROBERT H. McCREARY

Assistant District Attorney in
and for the County of Alameda,
State of California

CECIL MOSBACHER

Deputy District Attorney in and
for the County of Alameda,
State of California

Attorneys for Defendant
County of Alameda

[Endorsed]: Filed Sept. 21, 1940. [307]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 14th day of September, in the year of our Lord one thousand nine hundred and forty

Present: the Honorable Harold Louderback District Judge

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

On motion of W. E. Licking, Esq., Assistant United States Attorney, attorney for plaintiff, Ordered that this case be placed on the calendar for September 21st, 1940, at 9:30 a. m., for settlement of findings of fact and conclusions of law. [308]

[Title of District Court and Cause.]

NOTICE

To: Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
Court House Building,
Oakland, California.
Frank J. Hennessy, Esq.,
United States Attorney,
Post Office Building,
San Francisco, California.
E. J. Foulds, Esq.,
65 Market Street,
San Francisco, California.

You are hereby notified that on September 14th, 1940, Judge Harold Louderback Ordered that the

above entitled case be placed on the calendar for September 21st, 1940, at 9:30 A. M. for the settlement of findings of fact and conclusions of law.

WALTER B. MALING,

Clerk.

(a)

San Francisco, California

September 16th, 1940. [309]

District Court of the United States, Northern District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 21st day of September, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback, District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

This case came on regularly this day for hearing on the settlement of findings. After hearing attorneys, it is Ordered that said findings be submitted.

[310]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause heretofore came on duly and regularly for trial and hearing before this Court, sitting without a jury; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole, Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Attorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and Mr. E. J. Foulds, appearing for the defendants Central Pacific Railway Com- [311] pany, and Southern Pacific Company; both oral and documentary evidence having been introduced at the trial thereof, on behalf of the respective parties hereto, and the evidence being closed, and the cause submitted to this Court for its decision and determination, and the Court being duly advised in the premises, finds the following facts:

FINDINGS OF FACTS

I.

The plaintiff is the United States. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political

subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over and upon the Fruitvale Avenue Bridge hereinafter mentioned.

II.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San [312] Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor

extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred Feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, for the purpose of removing the sediment from the same, AND AFFORDING A DEEPER ENTRANCE TO [313] SAID SAN LEANDRO BAY THROUGH SAN ANTONIO ESTUARY AND THE CANAL, ALL IN THE INTEREST OF COMMERCE AND NAVIGATION ON THE EAST SIDE OF SAN FRANCISCO BAY.

III.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of \$100,000 was appropriated "for the improvement of Oakland harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War.

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled *The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al, defendants*, action No. 3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda.

IV.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain highways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was then

located. [314] The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things

“Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.

“It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal.”

V.

After said decree of condemnation, the United States constructed said Tidal Canal TO A DEPTH AVERAGING IN SOUNDINGS FROM 8 TO 10 FEET, SAID SOUNDINGS REFERRING TO

THE PLANE OF MEAN LOWER LOW WATER,—as per “Exhibit 2” page 91 of the “Agreed Statement of Facts” on file herein, and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue, THE LATTER WITH A CLEARANCE BELOW SUCH BRIDGE OF 12 FEET 8 INCHES ABOVE MEAN LOWER LOW WATER—as per “Exhibit 2” page 91 of the “Agreed Statement of Facts on file herein. The Park Street Bridge was completed [315]

in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own

responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal. The Tidal Canal was not open to navigation.

VI.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central [316] Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

VII.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (leasee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of \$50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to

relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal at Washington Avenue. The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in *United States v. Crooks et al.*

VIII.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution as follows:

“RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

“Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and [317]

“Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

“Whereas, that portion of said canal between said bridges has never been open to navigation; and

“Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

“Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and

“Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

“Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

“Be It Resolved that the County of Alameda, by and through its Board of Supervisors there-

unto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

“Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant [318] Colonel John Biddle, and to the City Clerk of the City of Alameda.

“Passed and adopted by the following votes:

“Ayes: Supervisors Bridge, Foss, Mullins and Ch. Honrner 4.

“Noes: Supervisors None.

“Absent: Supervisors Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the

Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,

County Clerk and Ex-officio
Clerk of the Board of Supervisors of Alameda County, Cal.

By H. M. WILSON,
Deputy Clerk."

IX.

On September 3, 1910, the Secretary of War issued a license to the County of Alameda as follows:

"J. A. G. O.
(27215)

"Whereas, by the Act of Congress approved June 25, 1910 entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes' (Public No. 264), and under the clause of appropriation therein for 'Improving harbor at Oakland, California', it is provided, inter alia, as follows:

'Provided further, that the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and

just to the United States and to said local authorities; provided further, that of the appropriation herein made so much as shall [319] be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer’;

“Now, Therefore, under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders [320] at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

“Witness my hand this 3rd day of September, 1910.

(Signed) JOHN C. SCOFIELD

Assistant and Chief Clerk

For the Secretary of War,
in his absence”.

X.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a Resolution as follows:

“RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor.....

At meeting held Nov. 10, 1913.

“Whereas, This Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved

June 25, 1910, entitled 'An Act making appropriations for the construction, repair and preservation [321] tion of certain public works on rivers and harbors, and for other purposes' (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing

and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and [322]

“Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does

hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foll, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D. 1913.

JOHN P. COOK,

County Clerk and ex-Officio
Clerk of the Board of Super-
visors of Alameda County,
State of California.

By H. M. WILSON,
Deputy Clerk."

XI.

On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot [323] strip of property along each side of the Canal for the construction of wharves and warehouses.

XII.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XIII.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was \$21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-1914 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows: [324]

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	\$ 1,937.84	\$ 1,875.47	\$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,796.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.53	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,398.59	14,379.24	
1934-35	15,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1937-38	12,663.73	14,695.79	
1938-39	12,059.32		
Total.....	\$262,148.19	\$240,672.69	\$200,245.57

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was \$703,066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approx- [325] imately One Thousand Dollars (\$1,000.00) per month, and the

cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alameda voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year.

XIV.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span draw-bridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The Central Pacific Railroad Company was at all times a private corporation.

XV.

The City of Oakland is on the mainland side of San Francisco Bay. Said City is, and prior to 1909, was, the terminal of all trancontinental railroads in central and northern California. Subsequent to the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, interstate and foreign commerce likewise increased upon the waters described, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar [327] sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows:

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033 [328]

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVI.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XVII.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of *United States v. Crooks*, and others,

and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed.

XVIII.

The decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the license agreement to be void. The "Petition for Writ of Mandate" before the Court in that case was filed originally in the [329] Supreme Court of the State of California on November 25, 1938. On November 28, 1938, said Supreme Court of the State of California transferred the case to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of *County of Alameda v. Ross*, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:—

I.

That the County of Alameda and the United States entered into a valid, binding contract, as

evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913. [330]

II.

That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue Bridge.

III.

The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge.

IV.

The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

V.

Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

VI.

The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corpora-

tion of public money prohibited by Section 31 of Article IV of the California Constitution.

VII.

The Contract between the County of Alameda and the United States does not violate Section 18 of Article [331] XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year.

VIII.

The contract between the United States and the County of Alameda is not void for lack of mutuality.

IX.

The contract between the United States and the County of Alameda is not void for uncertainty.

X.

The courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460.

XI.

That the defendants Central Pacific Railway Company, and the Southern Pacific Company were and are not parties to said contract between the said County of Alameda and the United States.

XII.

That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 10, 1940. [332]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 21467-L

UNITED STATES OF AMERICA,
Plaintiff,
vs.

COUNTY OF ALAMEDA (a Body Corporate
and Politic, and a Political Subdivision of the
State of California), CENTRAL PACIFIC
RAILWAY COMPANY, and SOUTHERN
PACIFIC COMPANY,
Defendants.

DECREE

This cause came on regularly for trial before the Court sitting without a jury on the 21st and 22nd days of March, 1940; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole,

Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Attorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and E. J. Foulds appearing for the defendants Central Pacific Railway Company and Southern Pacific Company, and the Court having heard the testimony and examined the proofs offered by the respective parties, [333] and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It is hereby ordered, adjudged and decreed:

1. That the defendant County of Alameda maintain, repair, and operate the Fruitvale Avenue bridge at its sole cost and expense;

2. That the County of Alameda rebuild said bridge at its sole cost and expense if the same should be burned, destroyed or become inadequate for the purpose it serves;

3. That the plaintiff and the defendants Central Pacific Railway Company and the Southern Pacific Company are required to pay nothing towards the maintenance, repair, operation or rebuilding of said bridge;

4. That the Court declares:

a. That the County of Alameda and the United States entered into a valid, binding con-

tract under which the County of Alameda became obligated to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge (which bridge is more fully described in the findings of fact filed herein), and the United States is relieved of all liability in respect thereto;

b. That the County of Alameda is now estopped to deny or question the validity of the contract between said County and the United States;

c. That the defendants Central Pacific Railway Company and Southern Pacific Company [334] were and are not parties to the contract between the County of Alameda and the United States.

5. That the counterclaim of the defendant County of Alameda be and the same is hereby dismissed, and the United States have its costs expended herein. Costs taxed at \$23.12.

October 21st, 1940.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 21, 1940. [335]

[Title of District Court and Cause.]

NOTICE

To:

Frank J. Hennessy, Esq.,
United States Attorney,
Post Office Building,
San Francisco, California.

Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
Court House Building,
Oakland, California.

E. J. Foulds, Esq.,
65 Market Street,
San Francisco, California.

You are hereby notified that on October 21st, 1940, a decree was entered of record in this office in the above-entitled case.

WALTER B. MALING,

Clerk.

San Francisco, California,
October 22nd, 1940. [336]

(a)

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements

Marshal's fees	\$ 2.62
Clerk's fees	10.00
Reporter's fees
Docket fee	10.00
Examiner's fees
Witness fees
Oath to this cost memo50
	<hr/>
	\$23.12

Costs taxed in the sum of \$23.12.

Oct. 28, 1940.

WM. J. CROSBY,
Deputy Clerk.

United States of America,
Northern District of California—ss.

William E. Licking, being duly sworn, deposes and says: That he is the Assistant U. S. Attorney in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

(Seal)

WILLIAM E. LICKING.

Subscribed and sworn to before me this 24th day of October, A. D. 1940.

J. W. GROSSMAN,
Deputy Clerk, United States District Court, North-
ern District of California. [337]

To Hon. Ralph E. Hoyt, District Attorney, Alameda County, California.

You will please take notice that on Monday, the 28th day of October, A. D. 1940, at the hour of 10 o'clock A. M., U. S. Attorney will apply to the clerk of said Court, to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said Court, in such case made and provided.

.....
Attorney for United States.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this.....day of October, A. D. 1940.

.....
Attorney for County of Alameda.

[Endorsed]: Filed Oct. 25, 1940.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF THE DEFENDANT
COUNTY OF ALAMEDA TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT UNDER RULE
73 (b).

Notice is hereby given that the County of Alameda, one of the defendants above named, hereby

appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of October, 1940.

Dated: January 17, 1941.

Signed:

RALPH E. HOYT,

District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY,

Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY,

Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER,

Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Appellant
County of Alameda.

Address:

Court House,
Oakland, California.

[338]

Service and receipt of a copy of the attached Notice of Appeal of the Defendant County of Alameda to the Circuit Court of Appeals for the Ninth Cir-

cuit under Rule 73 (b) is hereby admitted this 17th day of January, 1941.

FRANK J. HENNESSY,
Attorney for Plaintiff and Appellee United
States of America.

E. J. FOULDS,
Attorney for Defendants Central Pacific
Railway Company Southern Pacific
Company.

[Endorsed]: Filed Jan. 17, 1941. [339]

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents: That we, the County of Alameda, a body corporate and politic, and a political subdivision of the State of California, appellant and defendant in the above entitled action, as Principal, and United States Fidelity and Guaranty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business and issue surety bonds in the State of California, as Surety, are held and firmly bound unto the United States of America, appellee and plaintiff in the above entitled action, in the sum of Two

Hundred Fifty Dollars (\$250.00); to which payment, well and truly to be made, we bind ourselves, [340] our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of January, 1941.

Whereas, lately at a District Court of the United States for the Northern Division of California, Southern Division, in a suit pending in said Court, between United States of America, plaintiff, and County of Alameda (a Body Corporate and Politic, and a Political Subdivision of the State of California), Central Pacific Railway Company, and Southern Pacific Company, defendants, a judgment was rendered against the said appellant and defendant County of Alameda on the 21st day of October, 1940, and the said County of Alameda is filing its notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action,

Now, therefore, the condition of this obligation is such, that if the said County of Alameda shall pay costs if said appeal is dismissed or said judgment affirmed or pay such costs as said appellate court, the United States Circuit Court of Appeals for the Ninth Circuit, may award if the judgment

is modified, then the above obligation shall be void;
otherwise to remain in full force and effect.

COUNTY OF ALAMEDA,

a body corporate and politic,
and a political subdivision of
the State of California

[Seal] By GEO. A. JANSSEN

As Chairman of the Board of
Supervisors of the County of
Alameda, State of California,
Principal.

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

[Seal] By MILDRED DROST

Attorney-in-Fact.
Surety.

State of California,
County of Alameda, ss.

On this 17th day of January in the year of our
Lord One Thousand Nine Hundred and forty-one
before me, Clarence Laney, a Notary Public in and
for said County and State, residing therein, duly
commissioned and sworn, personally appeared Mil-
dred Drost, known to me to be the person whose
name is subscribed to the within instrument as the
Attorney-in-fact of the United States Fidelity and
Guaranty Company, and acknowledged to me that

she subscribed the name of the United States Fidelity and Guaranty Company, thereto as principal, and her own name as Attorney-in-fact.

In witness whereof, I have hereunto set my hand and affixed my official Seal, at my office in the County and State aforesaid, the day and year in this certificate first above written.

[Seal] (Attorney-in-fact)

CLARENCE LANEY

Notary Public in and for said
County of Alameda, State of
California. [341]

State of California,
County of Alameda, ss.

On this 17th day of January, 1941, before me, G. E. Wade, County Clerk of the County of Alameda, State of California, and ex-officio Clerk of the Superior Court in and for said County and State, personally appeared Geo. A. Janssen, known to me to be the Chairman of the Board of Supervisors of the County that executed the within instrument and the person who executed the within instrument on behalf of the County therein named and acknowledged to me that said County executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal]

G. E. WADE,

County Clerk and ex-officio
Clerk of the said Superior
Court of the State of Cali-
fornia in and for the County
of Alameda.

By J. C. HOLLAND

Deputy.

[Endorsed]: Filed Jan. 17, 1941. [342]

[Title of District Court and Cause.]

STIPULATION

The defendant and appellant County of Alameda having included in its designation of the portions of the record proceedings and evidence to be contained in the record on appeal of the above entitled action the reporter's transcript of the testimony of the witnesses Henry S. Pond and Edwin J. Foulds adduced at the trial of said action on the 21st and 22nd days of March, 1940; and

The plaintiff and appellee United States of America having filed its "Cross-Designation of Record on Appeal of Plaintiff and Appellee" wherein said plaintiff and appellee designated certain portions of the reporter's transcript of the proceedings at the trial of said action on the 21st and 22nd days

of March, 1940, to be included in the record on appeal,

It is hereby stipulated by and between the parties hereto by their respective attorneys as follows:

1. The entire reporter's transcript consisting of pages 1 to 104, inclusive, of the proceedings at the trial of said action on said 21st and 22nd days of March, 1940, is to be included in the [343] record on appeal;

2. That the defendant and appellant County of Alameda may file with the above entitled Court a copy of said transcript duly certified by the reporter who reported said proceedings in lieu of the original transcript of said proceedings and may file a copy of said certified copy of said transcript in lieu of a copy of the original transcript of said proceedings; and

3. A copy of this stipulation is to be included in the record on appeal.

Dated February 7th, 1941.

FRANK J. HENNESSY

W. E. LICKING

Attorney for Plaintiff and Appellee United States of America.

E. J. FOULDS

Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California.

J. F. COAKLEY

Chief Assistant District Attor-
ney in and for the County of
Alameda, State of California.

ROBERT H. McCREARY

Assistant District Attorney in
and for the County of Ala-
meda, State of California.

CECIL MOSBACHER

Deputy District Attorney in
and for the County of Ala-
meda, State of California.

Attorneys for Defendant and
Appellant County of Ala-
meda.

[Endorsed]: Filed Feb. 7, 1941 [344]

[Title of District Court and Cause.]

**STATEMENT OF THE POINTS ON WHICH
DEFENDANT AND APPELLANT
COUNTY OF ALAMEDA INTENDS TO
RELY ON APPEAL.**

The above entitled Court having made and entered a final judgment in the above entitled action in favor of the plaintiff United States of America

and against the defendant County of Alameda on the 21st day of October, 1940, and the defendant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and the defendant and appellant County of Alameda not having designated for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action, the said defendant and appellant County of Alameda hereby serves upon the appellee United States [345] of America and the defendants, Central Pacific Railway Company and Southern Pacific Company, and hereby files with the above entitled Court a concise statement of the following points on which it intends to rely on said appeal:

I.

That the fact set forth in paragraph V of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Tidal Canal was not open to navigation" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The Tidal Canal was navigable in fact".

II.

That the fact set forth in paragraph VII of "Findings of Fact" contained in "Findings of

Fact and Conclusions of Law” in the above entitled action, which said fact reads as follows: “The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in *United States v. Crooks, et al.*” is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: “The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge operated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in *United States v. Crooks, et al.*” [346]

III.

That the facts set forth in “Findings of Fact” contained in “Findings of Fact and Conclusions of Law” in the above entitled action are erroneous and insufficient in that from the evidence adduced at the trial and from the facts set forth in the stipulations of facts filed in said action the Court erred in not finding the following additional fact: “In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, *inter alia*, as follows:

‘Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to

transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.' "

IV.

That the fact set forth in paragraph XI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating machinery on the said [347] bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

"In 1910 a harbor line survey was made for San

Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made.

“In the making of said survey a survey made prior to 1876 for the purpose of the condemnation action of *United States v. Crooks, et al* was used in the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff’s Exhibit 12).

“The endorsement on the “Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912”, including Plaintiff’s Exhibit 12, read as follows:

‘War Department

“Washington, Jany. 20, 1913.

“The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines previously approved for the localities shown thereon.

ROBERT SHAW OLIVER

Asst. Secretary of War.’

“The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter

said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

“The area between pierhead and bulkhead lines as shown on Plaintiff’s Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff’s Exhibit 9 reading as follows: [348]

‘War Department.

“Washington, June 3, 1913.

‘The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized and permitted to occupy, with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE,

Asst. Secretary of War.’”

V.

That the fact set forth in paragraph XVI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460", should have read as follows:

"On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. [349] It was further agreed that should said County subsequently agree to operate said Bridge after March 31, 1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be pre-

judiced in any way by such operation or by such extension or extensions of time.”

VI.

That the fact set forth in paragraph XVIII of “Findings of Fact” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said fact reads as follows: “The Court, in the said case of County of Alameda v. Ross, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909”, is incomplete and erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

“The Court, in the said case of County of Alameda v. Ross, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909, but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said ‘Petition for Writ of Mandate’ in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to

and received by the United States Attorney in San Francisco during the proceedings and before the [350] case was submitted.”

VII.

That the conclusion of law contained in paragraph I of “Conclusions of Law” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said conclusion reads as follows: “That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913”, is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the resolution adopted by the Board of Supervisors of the County of Alameda on December 6, 1909, the license issued by the Secretary of War on September 3, 1910, and the resolution adopted by the Board of Supervisors of said County on November 10, 1913, did not constitute a valid contract and that neither the County of Alameda nor the United States is now or has ever been bound thereby.

VIII.

That the conclusion of law contained in paragraph II of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge.", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set [351] forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that there not being now and never having been a valid and existing contract between the United States and the County of Alameda, that the said County of Alameda is not now and never has been obligated to maintain, operate, repair or rebuild said Fruitvale Avenue Bridge.

IX.

That the conclusion of law contained in paragraph III of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipula-

tions of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda for the said County to maintain, operate, repair or rebuild the said Fruitvale Avenue Bridge is ultra vires and that the said County of Alameda is not now and never has been estopped to set aside the said alleged contract.

X.

That the conclusion of law contained in paragraph IV of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is [352] erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that neither the County of Alameda nor its Board of Supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XI

That the conclusion of law contained in paragraph V of "Conclusions of Law" contained in

“Findings of Fact and Conclusions of Law” in the above entitled action, which said conclusion reads as follows: “Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge”, is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the Congress of the United States has not now and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XII.

That the conclusion of law contained in paragraph VI of “Conclusions of Law” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said conclusion reads as follows: “The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution”, is erroneous [353] in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the expenditures

made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have been gifts of public money or things of value to individuals and municipal or other corporations, prohibited by Section 31 of Article IV of the Constitution of the State of California.

XIII.

That the conclusion of law contained in paragraph VII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violates Section 18 of Article XI of the Constitution of the State of California, which said constitutional provision forbids a county's incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year.

XIV.

That the conclusion of law contained in paragraph VIII of [354] "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for lack of mutuality", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for lack of mutuality.

XV.

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of consideration and that neither of said parties is now or ever has been bound thereby.

XVI.

That the conclusion of law contained in paragraph IX of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for uncertainty", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts

set forth in the stipulations of fact filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for uncertainty, both because of the cancellation clause contained therein and because of the ambiguity of its provisions. [355]

XVII.

That the conclusion of law contained in paragraph X of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the judgment of the District Court of Appeal of the State of California in the matter of County of Alameda v. Ross, 32 Cal. App. (2d) 135, 89 P. (2d) 460, interpreting the statutes, constitutional provisions and case law of the State of California in regard to the powers and limitations of powers of boards of supervisors and counties and setting forth the substantive law of that

State, is binding upon the United States District Court in the present action and that said Court is without authority to interpret said statutes, constitutional provisions and case law or to determine the said substantive law of said State contrary thereto.

XVIII.

That the conclusion of law contained in paragraph XII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the [356] stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the counterclaim of the defendant County of Alameda should be granted and that the United States is obligated to operate, maintain, repair and when necessary, to rebuild or replace said Fruitvale Avenue Bridge and that the County of Alameda is forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge.

XIX.

That the Court erred in not concluding as a matter of law that the alleged contract between the

United States and the County of Alameda not specifying any time for which said County was bound to maintain, repair and if necessary, replace the Fruitvale Avenue, Park Street and High Street bridges, was contrary to public policy and void and/or that said contract being silent as to the time of its duration was substantially complied with after a reasonable time and/or that said contract having failed to specify the term for which the obligation was to continue, was terminable at the will of either party.

XX.

That the Court erred in not concluding as a matter of law that equity will not enforce perpetual contracts or contracts which are uncertain as to the length of time of performance or compliance as to their terms.

XXI.

That the Court erred in not concluding as a matter of law [357] that equity should not decree specific performance of said alleged contract which is oppressive, unjust and unconscionable.

XXII.

That the Court erred in admitting over the defendant County of Alameda's objection the report prepared by G. H. Mendell, Major of Engineers, and others, dated at San Francisco, California, February 16, 1874 (Rep. Tr. p. 13).

XXIII.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference

to Offer of Evidence by the Defendant, County of Alameda," together with Exhibit I attached thereto, which said exhibit contained a Statement of Motion for a New Trial on behalf of Defendant Alfred A. Cohen in the matter of United States v. Crooks (lodged March 21, 1940), which said exhibit set forth the testimony of the witness Major G. H. Mendell given at the time of said motion in the matter of United States v. Crooks, et al., which said testimony explained the report of the said Major Mendell of February 16, 1874, and set forth the details of the construction of said Tidal Canal and purposes for which said Tidal Canal was to be constructed and particularly the fact that said Tidal Canal was to be navigable.

XXIV.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda," to the effect that Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with Reference to Offer of Evidence by Defendant County of Alameda [358] subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding and during his lifetime was the same party named as defendant in the case of United States v. Crooks, et al., which said Stipulation was lodged in the instant case on the 26th day of March, 1940.

XXV.

That the Court erred in overruling the defendant County of Alameda's motion to strike from the record all testimony of the plaintiff's witness, Henry S. Pond, given on direct examination, which said motion was based on the ground that said evidence was incompetent, irrelevant and immaterial; that it did not involve any of the issues of said case; that it did not establish any consideration for the assumption of control by the County of Alameda of said bridges or any consideration for any alleged agreement between the said County and the United States Government, and that any such purported agreement between said County and said Government was void and illegal because it was beyond the power of the Board of Supervisors and contrary to the Constitution of the State of California in that it would constitute a gift of public funds to private corporations and an expenditure of public moneys in excess of the income provided for any one year (Rep. Tr. pp. 48-49).

XXVI.

The Court erred in limiting the cross-examination of defendant County of Alameda of the plaintiff's witness, Henry S. Pond, in regard to leases by the United States Government of property along the Tidal Canal, to cross-examination concerning leases of lands lying between the High Street and Park Street bridges (Rep. Tr. 58-61). [359]

XXVII.

That the Court erred in ordering that judgment be entered in favor of plaintiff, The United States of America, on "Findings of Fact and Conclusions of Law" for the reason that said "Findings of Fact and Conclusions of Law" are each and every, all and singular contrary to the law and the evidence in the above entitled case and that, therefore, said decree is erroneous and should be set aside and said final judgment should be reversed and that the said United States Circuit Court of Appeals for the Ninth Circuit should order that judgment be entered for the defendant and appellant County of Alameda and that said defendant and appellant County of Alameda should have its costs expended herein.

Dated: January 17, 1941.

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California.

J. F. COAKLEY

Chief Assistant District Attor-
ney in and for the County of
Alameda, State of California.

ROBERT H. McCREARY

Assistant District Attorney in
and for the County of Ala-
meda, State of California.

CECIL MOSBACHER

Deputy District Attorney in and
for the County of Alameda,
State of California.

* Attorneys for Defendant and
Appellant County of Alameda.
[360]

Service and receipt of a copy of the attached
Statement of the Points on which Defendant and
Appellant County of Alameda Intends to Rely on
Appeal, is hereby admitted this 17th day of Janu-
ary, 1941.

FRANK J. HENNESSY

Attorney for Plaintiff and Ap-
pellee United States of Amer-
ica.

E. J. FOULDS

Attorney for Defendants Cen-
tral Pacific Railway Company
and Southern Pacific Com-
pany.

[Endorsed]: Filed Jan. 17, 1941. [361]

[Title of District Court and Cause.]

DEFENDANT AND APPELLANT COUNTY
OF ALAMEDA'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

The above entitled court, having made and en-
tered a final judgment in the above entitled action

in favor of the plaintiff United States of America and against the defendant County of Alameda on the 21st day of October, 1940, and the defendant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, the defendant and appellant County of Alameda does [362] hereby serve upon the appellee, United States of America, and the defendants, Central Pacific Railway Company and Southern Pacific Company, and does hereby file with the above entitled District Court a designation of the following portions of the record, proceedings and evidence to be contained in the record on said appeal:

I.

Complaint for Declaratory Judgment, filed as document numbered 1 on January 17, 1940, with the following exhibits attached:

Exhibit I. Decree in Condemnation Proceedings.

Exhibit II. Agreement of March 7, 1901.

Exhibit III. Resolution of Board of Supervisors of Alameda County, December 6, 1909.

Exhibit IV. License.

Exhibit V. Resolution of November 10th, 1913, Accepting License.

Exhibit VI. Notice of September 28, 1939.

Exhibit VII. Notice of July 27, 1939.

II.

Answer of Defendants, Central Pacific Railway Company and Southern Pacific Company filed as document numbered 3 on February 6, 1940.

III.

Answer of defendant County of Alameda to Complaint for Declaratory Judgment filed as document numbered 4 on February 7, 1940, with the following exhibits attached:

Exhibits I. Copy of Agreement made and entered into by and between the United States of America and the County of Alameda, dated the 24th day of October, 1933, concerning the construction of the Park Street Bridge.

Exhibit II. Copy of Agreement made and entered into by and between the United States of America and the County of Alameda dated the 2nd day of August, 1938, concerning the construction of the High Street Bridge. [363]

Exhibit III. County of Alameda, a Body Corporate and Politic and a Political Subdivision of the State of California, Petitioner, vs. Horace P. Ross, as Auditor of the County of Alameda, State of California, Respondent, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. (As contained in said California Appellate Reports.)

Exhibit IV. Copy of letter dated December 8, 1939, addressed to the Office of the United States District Attorney by attorney for Petitioner in County of Alameda v. Ross.

Exhibit V. Copy of letter dated January 3, 1939, addressed to the office of the United States District Attorney by attorney for Respondent in County of Alameda v. Ross.

Exhibit VI. Copy of letter dated January 3, 1939, addressed to office of the United States District Attorney by attorney for Petitioner in County of Alameda v. Ross.

IV.

Copy of Clerk's Minutes of March 21, 1940.

V.

Agreed Statement of Facts filed on March 21, 1940, together with the following exhibits attached:

Exhibit 1 (a) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Complaint in United States v. Crooks, et al.

Exhibit 1 (b) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Map of Tidal Canal, prepared by United States Army Engineers Office, 1882.

Exhibit 1 (c) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Opinion and Decision in United States v. Crooks, et al.

Exhibit 1 (d) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Findings of Fact and Conclusions of Law in United States v. Crooks, et al.

Exhibit 1 (e) admitted in evidence in instant case as part of Plaintiff's Exhibit I—Decree in United States v. Crooks, et al.

Exhibit 2 admitted in evidence as Plaintiff's Exhibit II—Map of Tidal Canal as of 1909.

Exhibit 3 admitted in evidence as Plaintiff's Exhibit III—Resolution of Board of Supervisors of Alameda County December 6, 1909.

[364]

Exhibit 4 admitted in evidence as Plaintiff's Exhibit IV—License, September 3, 1910.

Exhibit 5 admitted in evidence as Plaintiff's Exhibit V—Resolution of Board of Supervisors of Alameda County November 10, 1913.

Exhibit 6 admitted in evidence as Plaintiff's Exhibit VI—Notice of September 28, 1939 from County of Alameda to United States.

Exhibit 7 admitted in evidence as Plaintiff's Exhibit VII—Notice of July 27, 1939 from Central Pacific Railway Company and Southern Pacific Company to United States.

VI.

Plaintiff's Exhibit VIII—Stipulation of Facts with reference to offer of evidence by plaintiff, subject to objection of defendant, County of Alameda, as to materiality filed March 21, 1940, together with Exhibit I—Report of Chief of Engineers AA5 San Antonio Creek, San Francisco Bay, California, attached thereto.

VII.

Plaintiff's Exhibit IX—Title Sheet of Maps of San Francisco Bay, California, showing Harbor

lines prepared by the San Francisco Harbor Line Board, 1912, filed March 21, 1940.

VIII.

Plaintiff's Exhibit X—Map of Tidal Canal, Oakland Harbor, California, showing pierhead and bulkhead lines submitted by San Francisco Harbor Line Board June 11, 1912, approved by Secretary of War June 3, 1913, file Numbered 30-8-35, Sheet 5, filed March 21, 1940.

IX.

Plaintiff's Exhibit XI—Map of Oakland Harbor showing Harbor lines recommended by the Board of Engineer Officers October 11, 1888, filed March 21, 1940.

X.

Plaintiff's Exhibit XII—Map of San Francisco Bay dated April 25, 1918, showing pierhead and bulkhead lines, filed March 21, 1940 [365]

XI.

Stipulation of Facts with reference to offer of evidence by defendant County of Alameda, subject to objection of plaintiff as to materiality, together with Exhibit I—Statement of Motion for a New Trial on behalf of defendant Alfred A. Cohen in the matter of United States v. Crooks, et al., filed on March 21, 1940.

XII.

Copy of Clerk's Minutes of March 22, 1940 (both entries this date).

XIII.

Stipulation of Facts with reference to Offer of Evidence by Defendant, County of Alameda, subject to objection of plaintiff, as to materiality, lodged as document numbered 5 on March 26, 1940.

XIV.

Copy of Clerk's Minutes of March 26, 1940.

XV.

Copy of Clerk's Minutes of April 3, 1940.

XVI.

Copy of Clerk's Minutes of April 10, 1940.

XVII.

Order of April 10, 1940, denying defendant's motion to receive into evidence testimony of Major Mendell.

XVIII.

Notice dated April 11, 1940, of order denying defendant County of Alameda's motion to receive into evidence testimony of Major Mendell.

XIX.

Copy of Clerk's Minutes of June 27, 1940.

XX.

Order of July 9, 1940, that judgment be entered in favor of plaintiff on Findings of Fact and Conclusions of Law to be filed together with costs. [366]

XXI.

Notice dated July 10, 1940 of order that judgment be entered in favor of plaintiff on Findings of Fact and Conclusions of Law.

XXII.

Proposed Findings of Fact and Conclusions of Law lodged July 16, 1940.

XXIII.

Defendant County of Alameda's Proposed Amendments and Additions to Findings of Fact and Conclusions of Law lodged July 22, 1940.

XXIV.

Proposed Supplemental Conclusions of Law lodged August 2, 1940.

XXV.

Order of September 14, 1940, that matter be placed on calendar for September 21, 1940, for settlement of Findings of Fact and Conclusions of Law.

XXVI.

Notice dated September 16, 1940 of order that matter placed on calendar for September 21, 1940, for settlement of Findings of Fact and Conclusions of Law.

XXVII.

Copy of Clerk's Minutes of September 21, 1940.

XXVIII.

Findings of Fact and Conclusions of Law filed as document numbered 15 on October 10, 1940.

XXIX.

Copy of direction for the entry of judgment in favor of plaintiff on Findings of Fact and Conclusions of Law.

XXX.

Copy of decree entered of record October 21, 1940.

XXXI.

Copy of endorsement showing entry of decree of record on October 21, 1940. [367]

XXXII.

Notice dated October 22, 1940, that a decree was entered of record on October 21, 1940.

XXXIII.

Memorandum of costs and disbursements filed as document numbered 17 on October 25, 1940.

XXXIV.

Notice of Appeal of Defendant and Appellant County of Alameda to the United States Circuit Court of Appeals for the Ninth Circuit dated January 17, 1941, filed January 17, 1941.

XXXV.

Defendant and Appellant County of Alameda's Designation of Contents of Record on Appeal, filed January 17, 1941.

XXXVI.

Statement of Defendant and Appellant County of Alameda of the Points on which it intends to Rely on the Appeal, filed January 17, 1941.

XXXVII.

Copy of Bond on Appeal, filed by Defendant and Appellant County of Alameda on January 17, 1941.

Dated: January 17, 1941.

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California.

J. F. COAKLEY

Chief Assistant District Attor-
ney in and for the County of
Alameda, State of California.

R. H. McCREARY

Assistant District Attorney in
and for the County of Ala-
meda, State of California.

CECIL MOSBACHER

Deputy District Attorney in and
for the County of Alameda,
State of California.

Attorneys for Defendant and
Appellant County of Alameda.

[368]

Service and receipt of a copy of the attached De-
fendant and Appellant County of Alameda's Desig-
nation of Contents of Record on Appeal is hereby
admitted this 17th day of January, 1941.

FRANK J. HENNESSY

Attorney for Plaintiff and Ap-
pellee United States of Amer-
ica.

E. J. FOULDS

Attorney for Defendants Cen-
tral Pacific Railway Com-
pany and Southern Pacific
Company.

[Endorsed]: Filed Jan. 17, 1941. [369]

[Title of District Court and Cause.]

DEFENDANT AND APPELLANT COUNTY OF
ALAMEDA'S SUPPLEMENTAL DESIG-
NATION OF CONTENTS OF RECORD ON
APPEAL.

The above entitled court, having made and entered a final judgment in the above entitled action in favor of the plaintiff United States of America and against the defendant County of Alameda on the 21st day of October, 1940, and the defendant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and having on said date served upon the appellee, [370] United States of America, and the defendants Central Pacific Railway Company and Southern Pacific Company, and filed with the above entitled District Court a designation of the portions of the record, proceedings and evidence to be contained in the record on said appeal, the defendant and appellant County of Alameda does

hereby serve upon the said appellee, United States of America, and the said defendants, Central Pacific Railway Company and Southern Pacific Company, a supplemental designation of the following additional portions of the record, proceedings and evidence to be contained in the record on said appeal:

I.

Reporter's transcript of the testimony of the witnesses Henry S. Pond and Edwin J. Foulds adduced at the trial of the above entitled action on the 21st and 22d day of March, 1940.

II.

Defendant County of Alameda's Objections to Plaintiff's Supplemental Conclusions of Law.

III.

Defendant and Appellant County of Alameda's Supplemental Designation of Contents of Record on Appeal.

Dated: January 22, 1941.

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California.

J. F. COAKLEY

Chief Assistant District Attorney
in and for the County of
Alameda, State of California.

ROBERT H. McCREARY

Assistant District Attorney in
and for the County of Alameda,
State of California.

CECIL MOSBACHER

Deputy District Attorney in and
for the County of Alameda,
State of California.

Attorneys for Defendant and
Appellant County of Alameda.

[371]

Due service and receipt of a copy of the attached Defendant and Appellant County of Alameda's Supplemental Designation of Contents of Record on Appeal is hereby admitted this 24th day of January, 1941.

W. E. LICKING

Asst. U. S. Atty.

Attorney for Plaintiff and Appellee United States of America.

E. J. FOULDS

Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Jan. 24, 1941. [372]

[Title of District Court and Cause.]

CROSS-DESIGNATION OF RECORD ON
APPEAL OF PLAINTIFF ANND AP-
PELLEE

The plaintiff and appellee hereby designates the following portions of the record, proceedings and evidence to be included in the record on appeal in addition to the portions designated by the defendant and appellant County of Alameda:

(a) Testimony of Henry S. Pond taken at the trial of this cause on March 21 and 22, 1940;

(b) Testimony of E. J. Foulds taken at the trial of this cause on March 22, 1940;

(c) Colloquy of counsel in regard to the admissibility of certain evidence starting page 13, line 5, and ending at page 24, line 27, of the Reporter's Transcript;

(d) This cross-designation.

FRANCIS M. SHEA

Assistant Attorney General.

FRANK J. HENNESSY

United States Attorney.

SIDNEY J. KAPLAN

Special Assistant to the Attorney General.

BRICE TOOLE

Attorney, Department of Justice.

W. E. LICKING

Assistant United States Attorney.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 373 pages, numbered from 1 to 374, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America, vs. County of Alameda (a Body Corporate and Politic, and a Political Subdivision of the State of California No. 21467-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Fifty-four and 05/100 Dollars (\$54.05) and that the said amount has been paid to me by the Attorneys for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of February, A. D., 1941

[Seal]

WALTER B. MALING,

Clerk.

C. C. EVENSEN,

Deputy Clerk. [374]

[Title of District Court and Cause.)

REPORTER'S TRANSCRIPT

APPEARANCES

For the Government:

FRANK J. HENNESSY, ESQ.,
United States Attorney; by
W. E. LICKING, ESQ.,
Assistant United States Attorney;
BRICE TOOLE, ESQ.,
Attorney, Department of Justice.

For defendants Southern Pacific Company and
Central Pacific Railway Company:

E. J. FOULDS, ESQ.

For Defendant County of Alameda:

RALPH E. HOYT, ESQ.

District Attorney for the County of Alameda; by

J. F. COAKLEY, ESQ.

Chief Assistant District Attorney;

ROBERT H. McCREARY, ESQ.

Deputy District Attorney; and

CECIL MOSBACHER, Deputy District Attorney. [376]

Thursday, March 21, 1940

The Court: Who is appearing for the United States?

Mr. Toole: I am, your Honor. I expected Mr. Licking to introduce me this morning. I do not see him in court.

The Court: Is he not going to be present?

Mr. Toole: I expected him to be, but he is in another matter. I am attorney for the Department of Justice and have been admitted to this court, some years ago.

The Court: Do you mind giving me your name?

Mr. Toole: Brice is the first name, Toole.

The Court: You have been admitted in this district before?

Mr. Toole: Yes, your Honor; about ten years ago. I have not practiced here since.

Mr. Coakley: My name is Mr. Coakley.

The Court: Your first name?

Mr. Coakley: Frank.

The Court: You may proceed.

Mr. Coakley: And my associates are Miss Cecil Mosbacher and Mr. Robert H. McCreary of the District Attorney's office, Alameda County; and they are admitted to practice in this court.

The Court: They have been admitted heretofore.

Mr. Coakley: Yes, your Honor.

Mr. Foulds: My name is E. J. Foulds. I represent certain defendant railroad companies.

The Court: And your initials?

Mr. Foulds: E. J. Foulds.

Mr. Toole: May it please the Court, this is an action on a contract which was brought by the United States against the County of Alameda and against the defendant railroad companies to have the rights of the various interests of the parties defined and declared [377] and asking for specific performance by the companies to the contract. The

facts giving rise to the controversy are as follows:

In 1876, the United States instituted condemnation proceedings to acquire a right of way for what is now known as Tidal Canal of Oakland Estuary, which lies between the cities of Oakland and Alameda. The County of Alameda and the railroad companies were defendants in that proceeding. The decree in that condemnation action was entered in 1882, and that decree provided, among other things, that the United States construct and keep in repair suitable bridges across the Tidal Canal at the places where public roads and railroad rights of way were then situated. After the conclusion of the condemnation proceedings, the United States constructed the Tidal Canal and built bridges at Fruitvale Avenue and Park Street. These bridges were equipped with only hand-operated machinery. The work was completed in 1903. In 1909, I might say or thereabouts, the shores of the canal were not open to the construction of wharves, docks and warehouses. In 1909, the Board of Supervisors of Alameda County adopted a resolution in which the County offered to assume the burden of the maintenance, operation and replacement of the bridges which was imposed upon the United States by the original decree provided the United States would equip the bridges with electrical operating machinery and the United States would establish harbor lines and make the water canal open to adjacent property owners. That work was done by the United States; and in 1910, the Secretary of War issued a revocable license

turning the three bridges over to the County. The license was accepted by the County by resolution adopted by the Supervisors on November 10, 1913, and the County thereafter operated and maintained the bridges.

The Park and High Street bridges have been recently rebuilt by the County and the United States, and are not involved in the present controversies.

[378]

On September 28, 1939, the County notified the United States that it intended to cease its operation of the Fruitvale Avenue bridge; and on July 27, 1939, the railroad companies notified the United States that if the County refused to further operate the Fruitvale Avenue bridge that the railroad companies expected the United States to do so under the original condemnation decree. The Fruitvale bridge is a combination vehicular, pedestrian and railroad bridge.

Under these facts, the United States contends that the resolution of the Board of Supervisors of the County in 1909 was a valid offer of a county to operate, maintain and renew the bridges in consideration of the improvements by the United States, which improvements were requested by the County and made by the United States. The United States further contends a valid and enforceable contract came into existence under which the County is obligated to maintain, repair and operate the bridge,—the Fruitvale Avenue bridge. The United States further contends that the County is now

estopped from denying the validity of the contract. We have probably all the facts stipulated to, as your Honor can see; but from this statement there are a few things in dispute, and both the County and the United States propose to offer some evidence; and I think, so your Honor will have the details in mind, it might be well if I read the stipulation to the Court so that the Court would know the exact position of both parties. That is the original stipulation there. Most of those are exhibits; but the stipulation is fourteen to fifteen pages.

The Court: It is quite a stipulation; it is fourteen pages. If you desire to read it, you may do so; it may clarify it.

Mr. Toole: I believe it would be, to lay the foundation for the evidence being submitted by both sides. Starting with paragraph II, we merely state that the County of Alameda is a political subdivision of the State of California; and the railroad companies are corporations authorized and licensed to do business within the state. [379]

Paragraph IV is a description of San Francisco Bay, with which your Honor is undoubtedly familiar and we need not read that. I might start with paragraph V on page 3:

“In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of \$100,000 was appropriated ‘for the improvement of Oakland harbor;’ to be expended under the direction of the Secretary of War.”

That is the first appropriation having to do with this particular work. In 1876, as I stated in my opening statement, the United States commenced this condemnation proceeding, and a copy of the complaint, map of Tidal Canal, opinion and decision, findings of fact and conclusions of law, and the decree in the condemnation proceedings are attached to the stipulation.

It is then stipulated that that proceeding was prosecuted through to conclusion; and, on page 5 of the stipulation, I would like to invite your Honor's attention particularly to the provision of the decree in the condemnation proceedings that the defendants County of Alameda, the Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages were awarded to them.

"It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff, the United States, at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

At that time, of course, that was dry land there.

Starting with paragraph VII:

"After said decree of condemnation, the United States constructed said Tidal Canal to the extent shown on a map hereto attached and marked Exhibit 2 and thus by reference is incorporated [380]

herein and made a part hereof, and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue. Although said map is dated 1912, said map actually shows the conditions of said Tidal Canal and of said bridges as they existed prior to 1909.”——

I might stop there and invite your Honor’s attention to the fact it was in 1909 the County made its offer to accept the bridges; and the map which is attached to the stipulation shows the condition of the canal and bridges at that time.

“—The Park Street bridge was completed in 1891; the High Street and Fruitvale Avenue bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

“The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

“Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions

also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal.”

The next two paragraphs show that prior to the condemnation proceedings that railroad companies owned a right of way at Washington Avenue; that at some time subsequent, in 1901, the United States and [381] the railroad companies entered into an agreement whereby the United States paid the railroad company \$50,000 in consideration of the railroad’s abandonment of the Washington Avenue line. That is not particularly important to the case now before the Court.

Now, on December 6, in paragraph X, at page 7:

“On December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution, a full and true copy of which is hereto attached and marked Exhibit 3 and thus by reference is incorporated herein and made a part hereof.”

Your Honor will find Exhibit 3 at page 93 of the stipulation. That is the offer of the County.

“Resolution of the Board of Supervisors of the County of Alameda, State of California, Accepting Park Street, Fruitvale Avenue and High Street Bridges.

“Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale

Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

“Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

“Whereas, that portion of said canal between said bridges has never been open to navigation; and

“Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

“Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges [382] hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and,

“Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

“Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore——”

The Court: (Interrupting) Where are you reading from?

Mr. Toole: I am now reading from page 94.

The Court: I went back to see the map. After that, I didn't know where you were reading from. I saw the map giving the three bridges and showing the canal.

Mr. Toole: Page 94:

“Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish [383] harbor lines so as to permit the construction of wharves and docks——”

The copy of the resolution being signed and so forth.

Now, in paragraph XI of page 7 of the stipulation, it sets forth the provisions of the Rivers and Harbors Act of June 25, 1910, under which the Secretary of War was authorized to do this work and turn the bridges over to the County. On September 3, 1910, the Secretary of War issued a license to the County, after this work was done, reading in part as follows:

“unto the Board of Supervisors of Alameda County, California, a license, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.”

A copy of that license is attached to the stipulation marked Exhibit 4.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution, a full and true copy of which is attached hereto and marked Exhibit 5. Your Honor will find that resolution on page 98 of the stipulation—rather, on the page following, 99. I won't read this whole thing, except to invite the Court's attention to the fact that the resolution of November 10, 1913, recites the original resolution of December 6, 1909, whereby the County agreed to assume the bridges provided the United States would do certain work, and recites that that work was done.

On page 100, your Honor will find a statement of that resolution that:

“Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders’ houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required [384] by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be it resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges—”

I am now on page 8 of the stipulation, paragraph XIV, which sets forth that after that the bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present controversy.

Paragraph XV sets forth the total cost to the United States for the repair and electrification of the three bridges as \$21,358.80. It also sets forth the cost of operating the bridges, that is, the cost paid by the County for operating the bridges for the fiscal year 1913-14 to the present time, as far as the Fruitvale Avenue Bridge is concerned, and up to

the period of reconstruction of the Park and High Street Bridges. The total cost paid by the County,—page 9,—for maintaining is seven hundred three odd thousand dollars. This paragraph also agrees with the statement that:

“Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars (\$1,000.00) per month, and the cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00.)” [385]

Now, then, the last paragraph, page 9, your Honor will find this statement:

“The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alameda voting at an election held for that purpose.

“In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.”

The same statement as to the other two bridges up to the period of reconstruction; in other words, the County at no time had available the total cost of

operating these bridges, but it did have available each year the cost of maintaining and operating the bridges for each particular year.

Paragraph XVI of the stipulation describes the Fruitvale Avenue Bridge as a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier; and that the railroad tracks of the Central Pacific Railroad Company and its lessee the Southern Pacific Company are integral and inseparable parts of the bridge.

Paragraph XVII, beginning page 11, has to do with the growth of the cities of Oakland and Alameda, and a description of the growth of industry, shipping and commerce, in that County.

Now, on page 12, Paragraph XVIII:

“On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of County of Alameda v. Ross, 32 Cal. App. (2d) 135,—” [386]

“A full and true copy of said notice is hereto attached and marked Exhibit 6 and thus by reference is incorporated herein and made a part hereof. Said County has since agreed to operate said Bridge until March 31, 1940, but in so doing it has waived no rights, has expressly retained all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation. In the event that said County subsequently agrees to operate said Bridge

until a time after March 31, 1940, or extends said period from time to time, it will waive no rights, will expressly retain all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation or by such extension or extensions of time.”

Paragraph XIX alleges the notice served by the Railroad Companies on the United States.

Paragraph XX, page 13, refers to the case of the County of Alameda versus Ross, which held the alleged license agreement now before this Court to be void.

“The ‘Petition for Writ of Mandate’ was filed originally in the Supreme Court of the State of California on November 25, 1938. On November 28, 1938, said Supreme Court transferred the above entitled matter to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of County of Alameda v. Ross, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.” [387]

That was the original resolution offering to accept the bridges; but the United States was notified, by mailing to the United States Attorney a copy of the petition for a writ and a stipulation of facts and the briefs.

Mr. Toole: I have here a report prepared by G. H. Mendell, Major of Engineers, and others, dated San Francisco, California, February 16, 1874, which counsel has stipulated is what it purports to be, without further identification, which is offered in evidence for the purpose of showing the purposes of building the Canal. It is the first report of the engineers' office in connection with the construction of the Tidal Canal. Have you any objection, Mr. Coakley?

Mr. Coakley: If your Honor please, we do object that it is immaterial and irrelevant; however, we feel that we have no particular objection to it going in if the testimony of the man who made the report, who was in charge of this project, goes in with it, which explains the report. The report with respect to the Canal construction was very, very general; and, in view of the testimony of Major Mendell, who made this report, who was in charge of the construction of the Canal, and to the detail of construction and the manner in which it was to be constructed, that should be admitted with it. If counsel has no objection to the testimony of Major Mendell given in that condemnation proceeding in connection with this report, we have no objection to this report going in. We feel that both should go in.

Mr. Toole: The testimony of Mendell to which counsel refers was testimony given by him in the condemnation suit. In the condemnation suit, findings of fact were made and a decree was entered; and I don't believe the testimony of any witness having to do with the value of land or what the construction details might be, in that case, can be at all material in this case. The Major not only testified as to—and the complaint incidentally has been stipulated to,— [388] that is, the complaint in the condemnation proceedings,—and the complaint sets forth the purposes of the Tidal Canal, why it was to be built. I might read this statement from the complaint on page 24 of the stipulation:

“That the United States of America is duly authorized and empowered to improve Oakland Harbor, in said County and State, in the interest of commerce, and for that purpose it becomes and is necessary to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, which forms said Oakland Harbor, for the purpose of removing the sediment from the same, and thereby increasing the depth of water, and improving said Oakland Harbor.”

And it became necessary to have the strip of land above described,—that is on page 24 of the stipulation. That is an allegation from the complaint in the condemnation proceedings. What counsel proposes to offer is testimony of a witness who tes-

tified in the condemnation proceedings; which I believe is entirely immaterial in this case. What I have just offered is the report to the Chief of Engineers having to do with San Antonio Creek, San Francisco Bay, California, report of the Board of Engineers, which is not referred to in the complaint.

The Court: The objection they are making is covered by the fact that he testified, and it is placed in this new record?

Mr. Toole: That is right. I might say that testimony is— He was asked if he made a report,—this report here; and he answered “Yes”; and that report was offered in evidence, in the condemnation proceedings, and received in evidence. The witness whose testimony is now offered testified in the condemnation proceeding, tried over 50 years ago, and in which a decree has been entered 50 years ago, and his testimony would be absolutely valueless for any purpose in this case. It cannot be used to modify the decree or findings of [389] the Court or fix value, because everything was done in that case.

The Court: What is in the proposed exhibit that is lacking that you want to get in before the Court? What is the point that you made?

Mr. Coakley: Counsel offers a report in evidence,—a report of the Board of Engineers; and this report in connection with the construction of the Tidal Canal was testified to by Major Mendell. In that testimony, he testified that the report was very general and did not contain all detail as to the manner

of construction and improvement; and in his testimony he amplified that detail and went on and said how the Canal was being constructed, described it, and said something about the purposes, and said something about what kind of bridges would be constructed across the Canal; and so we feel that the testimony given in conjunction with the report in the condemnation proceedings is involved here, that the two should go together, because the report obviously——

The Court: In what way does it differ from the report, to enhance it? What is it that gives value to it?

Mr. Coakley: For instance, the report very generally says that bridges would probably have to be constructed across the Canal. Now, the testimony in conjunction with the report of Major Mendell was that the bridges would have to be constructed and they would have to be drawbridges because it was contemplated that this canal would be a navigable waterway, and one of the purposes would be navigation as well as improvement of the harbor and of getting and securing the effect of tides going in there. Those things do not appear in the report; but the testimony of Major Mendell does appear in the condemnation proceedings, which is referred to in the stipulation. The stipulation says that the Tidal Canal was constructed for the purposes set forth in the condemnation proceeding. We submit that the testimony—that the record of the testimony of Major [390] Mendell, who was in

charge of the construction of the Canal, and the plans connected with it were part of those proceedings referred to in the stipulation. If the report goes in, the testimony should go in with it. The report is ambiguous on its face. The testimony is in order to clarify the uncertainty and ambiguity appearing in the report, the decree and findings in *United States versus Crooks*, the condemnation case.

Mr. Toole: I think that last statement of counsel perhaps states my objection better than I can state it myself, because the complaint, the opinion and decision, the findings of fact, and conclusions of law, and decree in the condemnation proceedings have been stipulated. Your Honor has all this information before him. Now, counsel says he believes the testimony of Major Mendell should now be before this Court and explain those things; which is practically asking your Honor to retry that whole condemnation proceeding.

The Court: You have stipulated to those issues which are contained in that report? Is that the point you are making?

Mr. Toole: No; we have stipulated these various proceedings in the condemnation proceeding.

The Court: Then, why do you want the report?

Mr. Toole: The report had nothing to do with the condemnation proceedings. It was a report filed by the Chief of Engineers,—a report of the Board of Engineers.

The Court: But you are offering that.

Mr. Toole: Yes. That was the first report made as to the construction of this Tidal Canal,—the first Government report made—and the report that was submitted first to the Chief of Engineers and then, I suppose, to Congress. Congress then appropriated the money for the construction of the Tidal Canal.

The Court: This testimony given by this engineer is not apparently reflected in anything else? [391]

Mr. Toole: Yes, he did; he goes into the question of value.

The Court: It is not reflected in any other document; in other words, it was not made a part. You say that he testified. Does that report form a part of anything you are depending upon?

Mr. Toole: I don't understand you, your Honor.

The Court: Is that report—is it not embodied in the other papers?

Mr. Toole: The report is embodied in Major Mendell's testimony; and I am willing to stipulate Major Mendell's testimony in the condemnation proceedings—for the purpose of identifying this report, this report was offered in that case.

The Court: But you don't want his testimony in that case in this?

Mr. Toole: That is correct.

The Court: On the score of what?

Mr. Toole: For this reason: It seems to me it is practically asking this court to retry the condemnation proceeding. Now, there is the testimony of a great number of witnesses, your Honor. Your Honor has before you the decree in the condemna-

tion proceedings and the findings of fact and the complaint. Now, to put that testimony of a witness in that case in evidence in this case would be, it seems to me, reopening that case.

The Court: No; merely to enlarge the report, is it not, to bring facts not in the report?

Mr. Coakley: To explain the report.

The Court: You are claiming there might be something in the report——

Mr. Toole: I am willing to stipulate this: that the testimony of Major Mendell, where he refers to this report, may go in. I have no objection to limiting it to that.

The Court: But not on the other issues? [392]

Mr. Toole: The issues of value and other things before the Court in the condemnation proceeding.

The Court: Do you understand he is offering you what you want?

Mr. Coakley: No. We think that Major Mendell's testimony should go in, not for the limited purpose of identifying it, but it should go in in its entirety.

The Court: The proceedings themselves are coming in this.

Mr. Coakley: We feel Major Mendell's testimony should go in in its entirety, for whatever connection it may have, explaining this report, describing the manner of the construction of the proposed Canal. The report did not go into detail in that respect. In his testimony, he did, when he said the bridges contemplated would have to be drawbridges and so forth, 400 feet long. They did not put that

in the report, but it did appear in the testimony. In his testimony, he identified the report introduced in the condemnation proceeding, and introduced this report, and said it would involve drawbridges; and so his testimony is needed, I submit, in order to make any sense out of the report.

The Court: In that condemnation proceeding, they covered a certain field. This particular testimony you are asking to have was passed upon in that proceeding. In the findings in those proceedings, I presume they found everything essential or necessary to the case?

Mr. Toole: Yes.

The Court: Therefore, it does not need the testimony of the individual witnesses before the Court now to be brought out if they had sufficient evidence upon which to predicate what they did find. You would want this Court to find something in the condemnation proceedings over and above what was actually found upon the proceedings; is that the point?

Mr. Coakley: No. We say that the findings of fact, conclusions [393] of law and decree and the opinion and decision which are stipulated to as facts in this agreed statement of facts are ambiguous in that they do not go into detail as to the size of the bridges, the specific minute details of construction of bridges, and the construction of the Canal. They simply say, "Good and suitable bridges shall be constructed across the Canal." "Good" and "suitable" obviously are generally broad and

vague, so much so that it needs some clarification. In order to get that, we have to look to the proceedings which the law contemplates; and, in looking to the proceedings, we look to the report and testimony of witnesses, testimony of Major Mendell, as to the facts upon which the Court rendered a decree. The Court, by rendering and passing judgment, took into consideration these items of damage: value of the land to be condemned; severance damage which resulted, if any, from the separation of the land being taken for the Canal, from the land which was left—these elements of damage taken into consideration, and the question of damages or benefits from the construction of the improvements in the manner proposed, which, under the law, Section 1248 of the Code of Civil Procedure, taking into consideration the benefit to be derived from the construction; and in taking into consideration all those benefits, it had before it the testimony of Major Mendell as to the construction of those improvements. Therefore, we say his testimony must be read in connection with this—that is, the Court findings, the opinion and decree,—in order to find or understand the meaning of the decree when it said, “Good and suitable bridges across this Canal.”

The Court: In other words, you bind the Court by testimony of a witness who testified before the Court, even though the findings do not recite what type of bridges they were to be. In other words, he recommended a certain type of bridges; and

you would enlarge the findings to embrace what he testified—That is it, is it not? [394]

Mr. Coakley: Yes, your Honor; that is proper.

The Court: And that is what you are opposing?

Mr. Toole: Yes.

The Court: You feel it has been enlarged in the findings and the decree; that must be within the scope of what was found; and this would be endeavoring to expand?

Mr. Toole: For this Court to go behind the decree.

Mr. Coakley: That is not expanding. It simply explains the testimony. The findings are perfectly consistent with the testimony of what happened.

The Court: Let me go to another point: This report you are offering: is it referred to in the condemnation proceedings?

Mr. Toole: Yes. Major Mendell identified the report as the report made by him.

The Court: It was made an exhibit?

Mr. Toole: In the condemnation proceeding.

The Court: Was it recited that that is being referred to in the final decree or findings?

Mr. Toole: No, your Honor.

Mr. Coakley: But his testimony and testimony of other witnesses is referred to; and his testimony included the report.

The Court: You are explaining the findings by this proposed report?

Mr. Toole: No, your Honor.

The Court: Just what are you doing with the report?

Mr. Toole: I am not saying a word about the condemnation proceeding. I was satisfied with the evidence before your Honor.

The Court: He is going to oppose it being received. I am wondering how I shall receive it if it is not a part of the condemnation proceeding; that is, it doesn't form a part by reference or otherwise. How does it come into this hearing,—this [395] report?

Mr. Toole: I am offering this report to show the purpose for which the Government constructed the Tidal Canal as an official record from the Government. Counsel has stipulated it does not have to be further identified. As to whether the report was or was not offered in the condemnation proceeding is entirely immaterial to this case. Here is a report made according to the rules and regulations of the proper department, submitted to Washington, and which was the report that initiated the whole proceeding, the whole building of the Tidal Canal. This report may have been in condemnation proceedings or suits after they built the bridges; but it would not affect my purpose in offering it here.

The Court: Have you proved that was a report that was placed before the County of Alameda, also?

Mr. Toole: No——

The Court: That might be a secret report.

Mr. Coakley; No: it was introduced in the proceedings in the trial. It was so stipulated.

The Court: As the proposed plan?

Mr. Coakley: Introduced in the proceedings, and it is inferentially referred to in the decree and findings.

Mr. Toole: Here is our stipulation in regard to this report:

“It is hereby stipulated by and between the parties hereto by their respective attorneys that the following facts are true, subject to the objection by defendant County of Alameda as to materiality: 1. That the Board of Engineers of the United States Army made a report to Brigadier General A. A. Humphrey, Chief of Engineers, United States Army, with reference to San Antonio Creek, San Francisco Bay, California, dated at San Francisco, California, February 16, 1874; that a copy of said report is attached hereto and by reference incorporated herein and marked Exhibit 1.” [396]

It is also stipulated that the dam across the mouth of San Leandro Bay referred to in said report, was never built.

The Court: On what page is this?

Mr. Toole: This is the stipulation I was offering, identifying this report. This report shows the whole history.

The Court: I see what you have done. You are not obligated to anything. You have a stipulation to cover it. I don't have to go into it further. Now, this oral testimony given on this trial you have not so stipulated, and it stands on a different basis than the report.

Mr. Toole: I may say this, your Honor: When the proper time comes, as a matter of defense, counsel may want to offer that testimony of Major Mendell in the condemnation suit. The thing that has brought this to a head is that counsel offered to stipulate——

The Court: I think it is clear enough. This is being offered under the stipulation; and, although being offered, counsel now objects to its being received unless certain testimony is received.

Mr. Coakley: We have another stipulation.

The Court: On the same matter?

Mr. Coakley: Which goes with that.

Mr. Toole: It seems to me the stipulations are separate.

The Court: I don't know until I see it. I am not psychic. I do not see things without reviewing them. You have stipulated to the reception of this; you have omitted on Exhibit 1——

Mr. Toole: But that is just a reference. That stipulation, in fact, is this: that Major Mendell is the same man who testified in the condemnation proceeding, and who made the report; and the exhibit attached to that stipulation to which we have reserved our objection is omitted from his testimony.

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The Court: Is this the main issue you have before the Court here?

Mr. Toole: No. It seems to me that is out of order now.

Mr. Coakley: I would suggest, if the Court please, inasmuch as the two stipulations connect

themselves with this report here, that we file them at this time; and if the Court sees fit to take it under submission as to the admissibility of that evidence, we can discuss that in our briefs.

The Court: No; frankly, as far as I can read, it looks as if the stipulation, the second one you offered, does not make as a prerequisite that the testimony be received if the report is to be received.

Mr. Toole: That is correct, your Honor. It does not.

The Court: In other words, the Government has got from you an absolute right to place in evidence arbitrarily this report; then you in your turn have got from the Government the concession that testimony was given at this trial by this official, without anything that ties you in with the right to have it presented, to merely convince the Court you are entitled to have it presented, which, of course, is another situation. Whether you are entitled or not, apparently the first one is absolute. You don't question that, do you? It will be received.

Mr. Toole: The materiality is only given in the first.

Mr. Coakley: We feel simply if the report goes in——

The Court: In other words, you have agreed to have it go in. There is no qualification.

Mr. Toole: If the Court considers it material.

Mr. Coakley: If the Court considers it material.

Mr. Toole: It seems to me that the proper time for counsel to offer the testimony of Major Mendell

—that stipulation—would be in defense, not to offer it in connection with evidence [398] offered by the plaintiff.

The Court: That may be true. Of course, he wants to be in a position, in the future—I agree with you. My present attitude regarding it is it should be received as an exhibit. It will be number 1; and number 2 would not be received. However, this is only from the bench. I am not settled on that. I am wondering if that should not be one of the problems left with the case, because, on that basis, it would seem to me that your stipulation combined with it permits it to be considered. So far, unless I find from evidence produced that it may become relevant—but, at the present time, the other is not. However, I don't want you to hold I have reached any conclusion definitely, because, as I tried to grasp what your plan is right now, it is my general impression, if it becomes a problem in this case—Bear in mind my tendency is to take that attitude—As to whether or not I do, I assume, without saying, you will brief it or argue the matter later?

Mr. Coakley: I might suggest that, inasmuch as both of our stipulations have been prepared and are in writing, we file them with the Court, like we did the major stipulation.

The Court: I see no objection to that.

Mr. Coakley: And we discuss the admissibility of the testimony there offered and our offer in our briefs.

Mr. Toole: Do I understand the Court the report has been received in evidence?

The Court: No; I can receive it subject to a motion to strike out in case the other evidence is not given. It may be received as Government's Exhibit 1.

Mr. Toole: Pardon me, your Honor; it will be Exhibit No. 8.

The Court: You have already adopted seven of them. I have not given any order to that effect. I would just as soon make this the first, Exhibits 1 to 7, inclusive. [399]

Mr. Toole: The stipulation on the report is Exhibit 8?

The Court: This will be Exhibit 8; and we will adopt the other ones before the Court as bearing the numbers they bear.

Now, we have reached twelve o'clock. I presume we can conclude this this afternoon?

Mr. Toole: The Government has just one witness. I don't think it would take more than a half hour.

The Court: If necessary, we could use tomorrow morning. We will adjourn until two p. m.

(Document marked "Government's Exhibit No. 8.")

PLAINTIFF'S EXHIBIT No. 8

[Title of District Court and Cause.]

STIPULATION OF FACTS WITH REFERENCE TO OFFER OF EVIDENCE BY PLAINTIFF, SUBJECT TO OBJECTION OF DEFENDANT, COUNTY OF ALAMEDA, AS TO MATERIALITY.

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts are true, subject to objection by defendant, County of Alameda as to materiality:

I.

That the Board of Engineers of the United States Army made a Report to Brigadier-General A. A. Humphreyes, Chief of Engineers United States Army, with reference to San Antonio Creek, San Francisco Bay, California, dated at San Francisco, California, February 16, 1874; that a copy of said report is attached hereto and by reference incorporated herein and marked Exhibit 1.

II.

That the proposed dam across the mouth of San Leandro Bay, referred to in said Report, or any dam in connection with the waters referred to in the Report, was never built.

(Plaintiff's Exhibit No. 8—continued.)

Dated: March 21, 1940.

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torney for the County of Ala-
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the County of Alameda, State
of California,
Attorneys for Defendant,
County of Alameda.

(Plaintiff's Exhibit No. 8—continued.)

EXHIBIT 1

REPORT OF THE CHIEF OF ENGINEERS.

AA 5.

San Antonio Creek, San Francisco Bay, California.

Report of the Board of Engineers.

San Francisco, Cal., February 16, 1874.

General: The board of officers constituted by Special Orders No. 32, headquarters Corps of Engineers, Washington, D. C., March 24, 1873, for the purpose of making the examination and survey and plan of a harbor for San Antonio Creek, California, provided for in section 2 of the act making appropriations for rivers and harbors, approved March 3, 1873, has the honor to submit the following report:

As a preliminary step to the investigation of this subject, the board caused a map of San Antonio Estuary and Bar, and of San Leandro Bay, to be prepared from the best attainable information.

This map embraces the peninsula between these two bodies of water, the city of Oakland on the north side of San Antonio Estuary, and the marshes and sloughs on the east and south of San Leandro Bay.

The map also shows the depth of water in these two bays, the soundings being referred to the plane of mean low-water, as established by the United States Coast Survey.

The sloping shore is shown, with its depth of water at low-tide, from a point north of the present

(Plaintiff's Exhibit No. 8—continued.)

city of Oakland to a position opposite to the entrance to San Leandro Bay.

The board also caused special surveys to be made:

1st. Of the vicinity of the entrance to San Leandro Bay.

2d. Of a line for a tidal canal, to connect the waters of San Antonio Estuary with those of San Leandro Bay.

Tracings of the map and of the two special surveys, marked No. 1 and No. 2, are inclosed herewith.

The board also caused various borings to be made in order to ascertain the nature of the material with which it will have to deal in executing the suggested improvement of San Antonio Estuary.

Many of these borings are tabulated on the map, and others shown in the sections on that map, and on Nos. 1 and 2.

The board also caused simultaneous tidal observations to be made in San Antonio Estuary and in San Leandro Bay, in order to ascertain if there was a difference in the times of high and low tide in these two bodies of water, or a difference in the elevation of the water above a common 0 for the similar phases of the tides.

The results of these tidal observations are platted on the paper marked 3.

The positions of the two tidal stations are laid down on the map.

These tidal observations show that the water rises a little higher and falls a little lower in San Lean-

(Plaintiff's Exhibit No. 8—continued.)

dro Bay than it does in San Antonio Estuary; the mean difference in the range of the tides of these two bays being about four-tenths ($4/10$) of a foot.

It will also be observed that the times of high and low water are later in San Leandro Bay than in San Antonio Estuary; the mean difference in time being about one hour.

In considering a "plan of harbor" for San Antonio Estuary, we suppose we are to inquire to what extent this estuary can be developed so as to make it a commercial harbor; the number and character of vessels it could accommodate, if so developed, and the cost of such an enterprise.

After a careful study of our maps and examination of the ground, and all the surrounding circumstances, we have arrived at certain conclusions on these subjects, which we now proceed to state:

The estuary of San Antonio receives the drainage of only a small tract of country to the eastward of the city of Oakland, and having no large stream emptying into it to give a resultant current, it is doubtless slowly filling up by sediment brought into it from the surrounding shores during the rainy season.

The estuary, it will be noticed, spreads out at its upper end, so that it is much wider there than it is lower down.

This upper portion is very shallow, a great part of it being bare at low water.

(Plaintiff's Exhibit No. 8—continued.)

It is the water, however, which this wide but shallow portion of the estuary holds at high-tide, together with that contained in the sloughs and over the adjacent marshes, which scours out a considerable channel in the narrow portions on the ebb-tide when it becomes concentrated.

An examination of the map will show that off the end of Hibbard's wharf, where the channel is narrow, there is a depth of twenty-two feet of water in one place at low-tide.

Again, at the mouth of the arm of the estuary forming Lake Merritt, where it is again narrow, the depth increases, so that we find twenty-three feet in one place at low-water.

Still again, at the entrance of the estuary and for some distance outside of it, we have a depth of water ranging from twelve to eighteen feet at low-water.

But as we go outside, the water flowing out of the estuary is dispersed over a large area, and the depth gradually diminishes until, at the distance of a little more than a mile from the entrance, a bar is formed, having only about two feet of water over it at low-water.

It is a natural inference, therefore, to conclude that it is the scouring effect of the water flowing out of the estuary which maintains a channel of considerable depth wherever the water-way is sufficiently contracted to develop the necessary velocity of current.

(Plaintiff's Exhibit No. 8—continued.)

And we are forced to the conclusion that, if the water of the ebb-tide could be confined to a narrow passage from the entrance of the estuary out to deep water of San Francisco Bay, a channel would be scoured out to that bay, the depth of water in such channel becoming greater as the width of the passage diminished.

We speak of the ebb-current as doing this work, because it is a well-known fact, in relation to tidal harbors, that the greater portion of the scour of channels is done by the ebb-tide. The flood-current has comparatively little influence in scouring out a channel, because it is dispersive, while the ebb-current is concentrative.

The greater scouring effect of the ebb-tide is also due, in this case, to the manner in which the tides rise and fall in the bay of San Francisco; commencing at low-water large, the tide rises to high-water small, then falls to low-water small, then rises to high-water large, then falls to low-water large again.

Thus we have two steps to get from low-water large to high-water large, while we have but one step to get back again from high-water large to low-water large. It is the scouring effect of this large ebb-tide which keeps this channel open, and of considerable depth where it is sufficiently contracted.

We may observe that it is the latter portion of the ebb-current which is the most concentrated, and which produces the greatest scouring.

(Plaintiff's Exhibit No. 8—continued.)

It follows, therefore, that one of the first steps looking to the improvement of the entrance to this estuary is to contract the water-way over the bar.

The best method of making this contraction appears to us to be by two parallel training-walls of stone. The positions of these walls, with their proposed sections, are shown in detail on the map.

In order to afford the necessary room for navigation, these walls are placed one thousand feet apart from center to center of walls.

If it be found in time that a narrower passage will be more easily maintained at the necessary depth, the width can be easily and cheaply reduced by short wing-dams run out on one or both sides of the channel.

It will be noticed that the constructions we propose do not rise to the full height of the tide. We place the top of the two walls at the height of four feet above low-water, so that they will be entirely submerged at high-water. This insures that the estuary will be entirely filled by each high-tide, for the last of the flood will run freely over these walls, while the first part of the flood-tide and the last of the ebb-tide—which latter does the principal work of scouring—are guided and confined between the two walls.

Our borings on the bar at the mouth of San Antonio Estuary show that this bar is composed of hard sand to a depth of two or three feet, but below this there is a stratum of mud, soft sand, and

(Plaintiff's Exhibit No. 8—continued.)

broken shells nearly to the depth of the proposed channel of entrance, to be hereafter described; and below this, in places, hard sand is again found. This is a very favorable condition of things for obtaining a channel across or through this bar, either by dredging or by the action of the current when it is confined.

In fact, we believe, for the reasons already given, that in one or two years after these walls are constructed the current would, without other aid, wash out a channel between them of some twelve or fourteen feet in depth at low water, approximating in width and depth to the present channel in the estuary above.

Such a channel would be permanent, and it could be obtained at much less cost than by dredging.

The work that is necessary to be done to convert San Antonio's Estuary into a good harbor for commercial purposes naturally divides itself into three parts:

1. That connected with the entrance.
2. The harbor proper.
3. A tidal basin.

For the sake of easy reference, we have designated these portions on the map herewith by the letters A, B, C.

The entrance A is bounded on the northern and southern sides by the two submerged "training-walls."

The harbor B is to be inclosed on the Oakland and Alameda shores by bulk-heads, either of wood

(Plaintiff's Exhibit No. 8—continued.)

or stone, filled in behind, so that the entire length of these bulk-heads becomes available as wharves. Vessels lying alongside of these wharves will have their keels parallel to the direction of the currents both of flood and ebb-tides.

The tidal basin C is to be excavated to the depth of two feet below low-water, so that its entire tidal area will be available when the wants of commerce will justify the expenditure. Of course this space may also be excavated to any required depth, and surrounded by a bulk-head, thus converting it also into a commercial harbor.

But this tidal basin, C, even when excavated so as to make its entire tidal prism available for scour, will not be large enough to contain a quantity of water sufficient to open and maintain a wide and deep channel of entrance between the training-walls and in the harbor B.

Rather than incur the heavy expense of dredging out these channels, and the annual cost of maintaining them of the requisite depth, we have sought for a cheaper mode of construction, and one, too, by which the depth of water in the harbor and the approach to it will be preserved without the necessity of constant dredging.

Fortunately, such a plan is almost provided by nature.

If the capacity of the tidal basin C could be greatly increased in size, say, so as to double the present quantity of water flowing into and out of

(Plaintiff's Exhibit No. 8—continued.)

San Antonio Estuary, the escaping water of the ebb-tide in the case supposed would scour out and maintain a channel very much wider and deeper than the present one.

We propose to double the quantity of water flowing into and out of San Antonio Estuary by connecting that estuary with San Leandro Bay by a tidal canal of the proper size to insure the filling and emptying of that bay at each flood and ebb tide. For this purpose a dam across the present mouth of San Leandro Bay will be necessary.

Such a canal and dam are shown in the map herewith.

It will be noticed that this dam is not shown to the full height of high-water. To insure the filling of this bay, we only build the dam to the height of four feet above low-water level, which is the same as the height of the training-walls already described.

The flood-tide when it reaches this height will then flow freely over the proposed dam, and add greatly to the quantity of water entering the bay through the canal.

Of course during the first part of the ebb-tide the water will escape over the top of this dam, but after the water has reached the level of the top of the dam all the remaining water in San Leandro Bay must escape through the canal into San Antonio Estuary.

It is possible that in the future it may be well, in order to add to the scouring effect in San Antonio

(Plaintiff's Exhibit No. 8—continued.)

Estuary, to force all the tidal prism in San Leandro Bay to escape, at least during certain tides, through the canal.

To accomplish this, we have sketched automatic tide-gates on the top of the dam across the entire width of the entrance to San Leandro Bay from shore to shore.

These gates would be so arranged as to let the flood-tide flow freely into the bay, but would close, unless prevented from doing so, the moment of the beginning of the ebb current.

	Cubic feet.
The cubical contents of the tidal prism of San Leandro Bay, as it is at the present time, for a rise and fall of tide of six feet, is equal to.....	165,000,000
Of the proposed canal.....	20,000,000
<hr/>	
Total additional tidal prism in these two bodies of water	185,000,000

The cubical contents of San Antonio Estuary, as it is at present, are 157,000,000 cubic feet.

So we see that, when the whole tidal prism of San Leandro Bay is forced to flow out through the canal into San Antonio Estuary, the quantity of water escaping through that estuary on the ebb-tide would be considerably more than doubled.

Exactly what effect doubling this quantity of water would have in deepening the channel in San Antonio Estuary and the entrance between the two training-walls it is difficult to say or to calculate.

We could apply the usual hydraulic formulas governing the flow of water in such cases to the new

(Plaintiff's Exhibit No. 8—continued.)

condition of things when the whole tidal prism in San Leandro Bay and the proposed canal are forced to pass through San Antonio Estuary, but we do not think it necessary to encumber this report with them further than to show the result at which we have arrived. To do this, let us examine the circumstances at a single point only—say the mouth of San Antonio Estuary. We will state that—

The area of a cross-section at the mouth of San Antonio Estuary at

high-water mark = 12,302 square feet.

Area at low-water = 5,012 square feet.

2)17,314

Mean area 8,657 square feet.

Comparing this mean section with the tidal prism of the estuary, there results for a 6-foot tide a mean velocity of 0.838 foot per second. Now, when the whole quantity of water flowing out of this estuary is more than doubled, as it will be when the tidal prism of San Leandro Bay and the canal are forced through it, the mean velocity of the escaping tide will be fully doubled, and the water will begin to scour for itself a deeper and wider channel, until an equilibrium is established between the strength of the current and the resistance of the particles to be moved. Then the size of the channel will become fixed, and its depth will remain permanent.

Exactly what depth of water would be obtained by the proposed constructions is a question, as we

(Plaintiff's Exhibit No. 8—continued.)

have already observed, which it is impossible to foresee. But as the present depth of water at the point we have chosen for illustration is 14 feet at low water at the present time, and as the material to be removed in order to obtain a deeper channel is generally soft mud, like that on the present bottom and sides of the channel, we think it entirely reasonable to conclude that, when the tidal currents flowing through this channel are fully doubled in volume, the depth of the channel will be increased 18 or 20 feet at low-tide.

The same remarks apply to the depth of water in the entrance between the two training-walls, but with still greater force; for the material to be moved there, except for 2 or 3 feet on the surface, is of the same general character as that in the estuary, and the scouring effect there would vary as the quantities of tide-water that lay above any given section-line.

The order in which this work should be executed would be as follows:

First. Construct the two submerged training-walls, beginning at the shore and carrying them out simultaneously, terminating them about the points indicated on the drawing.

Within a year after these walls shall have been completed, with perhaps a little dredging to break the hard sand on the surface so as to direct the course of the scour downward into the soft material, instead of leaving it spread out over the en-

(Plaintiff's Exhibit No. 8—continued.)

tire surface of harder material, we are of the opinion that a channel would be scoured out between these walls of some 12 to 14 feet in depth at low-tide. This of itself would be a great advantage to San Francisco and Oakland, as well as to the traveling community generally. For then all ferry-boats, river and bay steamers could pass freely from San Francisco or other points on the bay to wharves at Oakland, instead of landing, as they now do, at the end of a wharf some two miles from shore, and carried thence on cars over a wooden bridge, which, however, carefully watched, many persons fear will some day or other be the cause of a serious accident.

As there are now some sixty-seven thousand over-land passengers and two million ferry passengers for Oakland and the neighborhood passing over this long bridge yearly, the importance of the consideration above mentioned will be manifest.

Second. Excavate the canal between San Antonio Estuary and San Leandro Bay.

Third. Construct the dam at the mouth of San Leandro Bay.

Fourth. Excavate the tidal basin C.

Then, after the expiration of one or two years, or when the new tidal prisms have done their work, we will know what excavation will be necessary to enable the largest ships to enter the new harbor, so as to "bring ship and car together."

We proceed to give an approximate estimate of cost for executing this work according to the designs shown in the drawing:

(Plaintiff's Exhibit No. 8—continued.)

1.—Number of cubic yards of stone in the training-walls127,200

Number of cubic yards of stone in the aprons, sup-
posing them to be 20 feet square and 2 feet thick,
and placed 100 feet apart between centers..... 6,650

Total cubic yards of stone in training-walls.....133,850

Which, at \$3 per yard, amounts to..... \$401,550.00

In this estimate we have disregarded the void spaces between the stones, which will be a liberal allowance for the settlement of the stone in the sand, and for the stone that may be washed away by storms during the construction.

We allow two tons of two thousand (2,000) pounds each to the cubic yard.

We suppose the stone to be obtained at Yerba Buena Island.

Dredging.

To dredge a channel between training-walls 100 feet wide and to a depth of 6 feet below low-water, removing thereby the hard sand on the surface of the bar, 113,300 cubic yards, at 30 cents per cubic yard.....

33,990.00

435.5400

Add 10 per cent. for contingencies.....

43,554.00

479,094.00

2.—Excavation of canal.

Number of cubic yards of excavation in the canal to give a depth of 8 feet of water at low-tide from San Antonio Estuary to San Leandro Bay 2,329,980, at 15 cents per cubic yard

\$349,497.00

We have put the estimate for the excavation of the canal at a low figure, because we suppose the excavated material can be used for filling up the marshes in the rear of the bulk-heads at Oakland and Alameda, and that whoever makes this excavation will also fill in these marshes.

The same remarks apply, though to a less extent, to our estimate for the dredging.

(Plaintiff's Exhibit No. 8—continued.)

3.—Dam

At the mouth of San Leandro Bay. Number of cubic yards of stone in the dam, 21,670, at \$3 per cubic yard.....	65,010.00
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4.—Tidal Basin C.

Number of cubic yards of excavation to give a depth of 2 feet below low-water, 3,198,100, at 25 cents per cubic yard	799,525.00
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1,214,032.00

Add 10 per cent. for contingencies.....	121,403.20
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Total cost of Nos. 2, 3, and 4.....	1,335,435.20
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At this point our estimate ends. We suppose, if the United States undertakes the improvement of San Antonio Estuary it will confine its efforts to making the harbor accessible for the usual sea-going vessels, and to securing the natural forces of conservation by providing the maximum available tidal areas.

This done, whatever shall remain in the way of providing conveniences and accommodations for commerce, may, we think, with propriety, be left to the commercial interests concerned.

Possibly some future work may be required to obtain the necessary depth of water between the two training-walls. This may be done at first, as we have stated above, by short wing-walls thrown out on either side of the channel, thereby confining the water-way to a width sufficient to maintain the requisite depth.

As commerce increases, the ends of these wing-walls can be taken up, and the width of the channel

(Plaintiff's Exhibit No. 8—continued.)

of approach increased from time to time, if necessary, by dredging.

Here we ought to state, that if our only object had been to provide a narrow and deep channel of entrance to San Antonio Estuary, we would have placed the training-walls only about 500 feet apart; but looking to the probable future wants of this harbor when its commerce may be large, we thought it best to provide a wider entrance.

When the work we have described is completed, Oakland and Alameda will have a fine land-locked harbor or basin at B, capable of accommodating forty large ships at the same time alongside their wharves, with room for as many more at anchor in the estuary, and have room besides for as many ferry-slips as would be wanted to accommodate travel.

Oakland is not a port of entry, the nearest port being San Francisco, distant about five miles. Oakland is so intimately connected with San Francisco that the interests of the two cities, if not identical, are as nearly allied as those of New York and Brooklyn.

We learn from the newspapers of the day that there were 67,000 overland passengers, 2,000,000 ferry passengers, \$32,000,000 in treasure from the mines of California and Nevada; 450,000 tons of general freight; 161,000 tons of wheat, valued at \$6,440,000, all passing over the long-wharf at Oakland during the past year.

(Plaintiff's Exhibit No. 8—continued.)

As both travel and trade between the two cities are increasing rapidly, and the present wharf is only a temporary one, it would seem that the interests of the two cities would be greatly increased by some more permanent landings at Oakland.

If such be the views of Congress, and if it be decided to improve the harbor of Oakland, we recommend the appropriation of the amount necessary to construct the two training-walls, and dredge out a channel between them 100 feet wide, having a depth of 6 feet at low-water, at the present session of Congress, viz, \$479,094.

This amount would give a beneficial and useful result at once, and establish all the travel and much of the trade between the two cities on a better basis of communication than they now have.

We will close this report by stating that there are many details connected with this improvement into which we cannot enter without prolonging this paper to unreasonable length; such, for instance, as the objections which may be urged against closing up the natural entrance into San Leandro Bay, and to what extent these objections may be compensated by affording a deeper entrance to it through San Antonio estuary and the canal; such, also, as the objection to placing obstructions in the tidal prism of the Bay of San Francisco, and how far this objection may be compensated by increased tidal water in San Antonio estuary and the canal connecting it with San Leandro Bay.

(Plaintiff's Exhibit No. 8—continued.)

Again, there will be land-damages, and bridges will be required over the proposed canal.

Still, again, the two bridges across the harbor at Oakland will not be suitable structures when that harbor has an active commerce.

As the first work to be done will be to build the training-walls and dredge a channel between them, time will be afforded during the execution of this work to mature the details of all such special matters not herein discussed.

Respectfully submitted,

G. H. MENDELL,

Major of Engineers.

C. SEAFORTH STEWART,

Lieut. Col. of Engineers.

B. S. ALEXANDER,

Lieut. Col. of Engineers.

Brig. Gen. A. A. HUMPHREYS,

Chief of Engineers, U. S. A.

[Endorsed]: Plaintiff's Ex. 8. Filed 3/21/40.

(Thereupon, an adjournment was taken until 2 o'clock p. m., this date.) [400]

Afternoon Session

The Court: You may proceed with the hearing. I presume, as far as either side, if any attorneys are absent, the others are prepared to go ahead.

Mr. Coakley: As I understand it now, Mr. Toole, the purpose of this proceeding now is simply with

reference to the establishment of harbor lines? It is limited to that?

Mr. Toole: It is generally limited to that. I don't want to put myself on record strictly about harbor lines. Bridges may come in.

Mr. Coakley: I understood today we would have testimony as to the establishment of harbor lines.

Mr. Toole: That is it, generally. I am not going to guarantee what might develop in the course of my examination.

The Court: You intend to put the whole subject matter before me. In other words, it is going to be complete; and any ruling I make will determine the entire issue, except, of course, if you take exception to my ruling.

Mr. Coakley: We have come to an agreement of facts stated in the big stipulation. There are two other matters,—the report and testimony of Major Mendell,—which we stipulated to subject to objections on both sides as to materiality. As I understood, the one thing in issue, the only thing we are going to have testimony on today, is the establishment of harbor lines; and that is all we are prepared to meet today.

Mr. Toole: That is generally true, your Honor. I may say, as a foundation for the evidence that the Government proposes to introduce, that in the resolution of December 6, 1909, the County offered to accept the bridges provided the United States would equip them with electrical operating machinery; and provided further that [401] the United States would

lease the waterfront on the Tidal Canal and establish harbor lines that are in the offer of the County. In the resolution accepting the license, the County recites that the waterfront was leased and that harbor lines were established. The witness we propose to call now will testify as to just those two things. That is true.

The Court: Is it the contention this is false; that they did not do that?

Mr. Toole: No, your Honor. That was done.

The Court: And the other side is denying it was done?

Mr. Toole: Yes, at least in the stipulation.

Mr. Coakley: Our position is whether or not harbor lines were established and whether or not any of the waterfront was ever thereafter leased by the Government is an incidental part of this whole proceeding; but there was some question about it and it was thought it would be better to present the evidence with reference thereto.

The Court: If the evidence given does not so establish it, I presume you feel that is to your advantage?

Mr. Coakley: We don't want to be in the position of emphasizing——

The Court: It is not a material issue?

Mr. Coakley: It is a rather insignificant part of our defense; but we want to take advantage of all the points that may be involved in the facts.

The Court: You do not mean it could not be determined, then?

Mr. Coakley: No.

Mr. Toole: I will call Mr. Pond.

HENRY S. POND,

called for the United States; sworn.

Direct Examination

Mr. Toole: Q. Your name is Henry Pond?

A. Yes, sir. [402]

Q. Where do you reside?

A. At 1064 San Antonio Avenue, Alameda.

Q. What is your occupation?

A. I am senior civil engineer in the United States Engineer's office.

Q. How long have you been connected with the United States Engineer's office?

A. Continuously since September, 1914, except for approximately two years at the war time, and approximately sixteen months in 1922 and 1923.

Q. When you speak of the United States Engineer's office, you mean the main office here in San Francisco?

A. I was in the Second San Francisco District, which is now the Sacramento District, one year, 1914—September, 1914, to 1915. All my other duty has been with what is now the San Francisco District.

Q. What are your present duties in the United States Engineer's office in San Francisco?

A. I am chief of the engineering division.

(Testimony of Henry S. Pond.)

Q. What documents or records, if any, are under your custody in that office?

A. The maps and all files directly in reference to the maps are in my custody.

Mr. Toole: Mark that for identification.

The Clerk: You will have to apply to the Court for exhibit numbers.

Mr. Toole: I want this marked for identification. I think it is No. 9.

The Court: We usually have them marked by letters for identification so as to distinguish those received in evidence from those that are not. The numbers are received; and the others are identified. I think this would better be marked Exhibit "A"—Government's Exhibit "A". What is it characterized as?

Mr. Toole: It is "Title Sheet." I have one for your Honor's convenience.

(Document marked—"Government's Exhibit A For Identification." [403])

Mr. Toole: Q. I hand you a document marked Government's Exhibit "A", and ask you whether or not that is a blueprint or copy of a document in your custody, in your official position.

A. This is a reduced copy of a title sheet of the harbor line maps for San Francisco Bay from my office.

Q. From your office? A. Yes.

Q. What is that document?

Mr. Coakley: Just a moment. That is objected to on the ground the document speaks for itself;

(Testimony of Henry S. Pond.)

that is the best evidence.

Mr. Toole: Q. Describe generally what it is. Can you do that? Without stating what is in this particular document, what do you call the document I have handed you?

A. Title sheet. It pertains to a series of sheets of maps, all of the same—all belonging together, bound together.

Q. Now, Captain Pond, in your experience as an engineer with the Government, have you ever done any work in the establishment of harbor lines?

A. Yes; my duties include harbor line work, which is done by our office.

Q. At the present time? A. Yes.

Q. What past experience have you had?

A. Those have been my duties since 1920 in part—I mean, in part my duties.

Q. What is a harbor line, Captain Pond?

A. A harbor line?

Mr. Coakley: Just a minute. May I object at this time on the ground it is incompetent, irrelevant and immaterial, calling for his conclusion as to a matter of law and calling for his conclusion on matters of fact, also.

Mr. Toole: I just asked the witness to define what a harbor line was.

The Court: He knows that is a matter of law as to what a harbor line is.

Mr. Toole: I withdraw that question; strike it out. [404]

(Testimony of Henry S. Pond.)

Q. What is a harbor line, as used in engineering parlance?

Mr. Coakley: The same objection: on the ground it calls for the opinion and conclusion of the witness as to matters of fact and law; incompetent, irrelevant and immaterial.

The Court: I don't know if a matter of law is involved. There must be a definition in connection with engineering which is a subject only, I presume, of going to the dictionary to find out what it means. I think he could, as an engineer, state what he understands is such. If that is the question, I will allow it.

The Witness: Do I answer?

The Court: Q. You are an expert engineer?

A. I presume I am.

Q. Don't you know?

A. In fact, I consider I am an expert engineer.

Q. Do you feel you are entitled to testify what that means? A. Yes.

Q. Answer that.

A. A harbor line is a reference line defining the distance out to which shore structures may be built over navigable waters of the United States.

Mr. Toole: Q. Will you describe the mechanics of establishing harbor lines?

A. Harbor lines normally can only be established in localities where there is apt to be sufficient port development so that it is desirable that they should be coordinated all along the general lines;

(Testimony of Henry S. Pond.)

so that it should normally be decided that harbor lines should be established in some localities and waters given for survey for that purpose; the survey is normally done by the district which has the waterway under jurisdiction. The surveys consist of the hydrography,—that is, the soundings; that is, survey of the shore frontage, with what we normally call three-degree action; that is fairly accurate. Then the surveys are platted, together with all of the shore development that is in existence at the time; and a tentative system of lines is laid out up to which piers may be constructed or solid fills made so as to base the coordinated [405] development of the area with the least infringement on the navigable waters. Those lines are then mapped out; the maps with them on are forwarded through the engineers in a report to the Chief of Engineers, who refers them to the Secretary of War; and if they are approved he so endorses on them, and they become the harbor lines as established.

Q. Are there any records in your office to show harbor lines were established in the Tidal Canal?

Mr. Coakley: Just a minute. I object to that on the ground it is incompetent, irrelevant and immaterial, calling for the conclusion of the witness as to matters of fact and law. The records themselves would be the best evidence.

Mr. Toole: I asked if there were such.

(Testimony of Henry S. Pond.)

Mr. Coakley: Let the record show my objection.

The Court: Do you still press your question?

Mr. Toole: No; I withdraw that question.

Q. Referring to Government's Exhibit "A"—

Mr. Toole: I offer that exhibit in evidence now, your Honor. That shows the establishment of harbor lines.

The Court: No objection?

Mr. Coakley: I have no objection to that sheet, your Honor.

The Court: That will be received as Government's Exhibit 9 in evidence.

(Document marked "Government's Exhibit No. 9.")

(Testimony of Henry S. Pond.)

Mr. Toole: Q. The endorsement on Exhibit 9 states in part as follows:

“The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized—”
et cetera. [406]

Have you in your custody either the sheet I have referred to in that endorsement or a copy of it?

A. No.

Q. Have you made a search? A. Yes.

Q. Calling your attention to a map on the board

Can your Honor see this? I imagine not.

The Court: It all depends. I can see where you are pointing to, showing certain streets; but I cannot see the canal limits. If you will, point to it. It looks like a section of the Bay or Estuary.

Mr. Toole: Here is the Bay. Here is the Tidal Canal; and here is the other.

The Court: I can follow to that extent.

Mr. Toole: Q. Inviting your attention to——

I think I would better have this marked. That would be Exhibit “B”?

The Court: You want to have marked Exhibit “B” for Identification the document on the board; the smaller white one will be marked “B” for Identification,—a map.

(Document marked “Government’s Exhibit B For Identification.”)

(Testimony of Henry S. Pond.)

Mr. Toole: Q. Inviting your attention to the map marked Government's Exhibit "B," I ask you whether it is a copy or blueprint of Sheet No. 5 which is referred to in Government's Exhibit 9,—title sheet you have in your hand.

Mr. Coakley: Is that a question?

The Court: Have you finished?

Mr. Toole: I said: referring to Government's Exhibit "B." I asked the witness whether or not it is a copy of the blueprint or Sheet No. 5 which is referred to in Government's Exhibit 9,—the title sheet.

The Witness: A. No.

Mr. Toole: Q. Wherein does it differ from original Sheet No. [407] 5 referred to in Government's Exhibit 9?

A. Certain corrections have been made——

Q. Do you want to point them out?

A. (Continuing) ——on a table of coordinates which gives the location of the canal points, harbor line points, points of harbor lines; corrections have been made to those coordinates for certain points, and in addition a front section of pierhead line has been added at the extreme upstream end of the Tidal Canal at San Leandro Bay.

Q. So far as Government's Exhibit "B" is concerned, does it show the same lines between the High Street and Park Street bridges as the original Sheet 5 which is referred to in Government's Exhibit 9? A. Yes.

(Testimony of Henry S. Pond.)

Q. How do you know that, Captain Pond?

A. There are two reasons: one reason is that I have found the correspondence drawing attention of the Chief of Engineers to these corrections, and forwarding them, saying that the error had been discovered in original Sheet 5, and sending forward a corrected sheet with these on; and in return the approval of the Chief of Engineers bearing this number on this; it is in the reverse: 36925

102 .

Q. Does Government's Exhibit "B" show harbor lines between Park and High Street Bridges?

Mr. Coakley: That is objected to on the ground that it is incompetent, irrelevant and immaterial, and not within the issues of this case, and it is not involved in the alleged license agreement of 1910 setting forth the conditions under which the County assumed the control and operation of the bridges; that the establishment of harbor lines was not the consideration for the assumption of control by the County because of the fact that the Government in establishing harbor lines was doing only what it was already bound to do and for the benefit of commerce and protection of Government property along there; and that the alleged agreement [408] between the County and the Government was illegal and beyond the scope of the authority of the Board of Supervisors of Alameda County; and that, further, that reference to whether or not this

(Testimony of Henry S. Pond.)

map shows harbor lines between what was the point of Park and High Street bridges is asking the witness to testify to the contents of a document. I submit the document speaks for itself. On those grounds, I submit the objection.

Mr. Toole: I would like to change the form of my question, then, your Honor. However, before I do so, in answering counsel's objection, I invite the Court's attention to the fact, as I did before, that the 1909 resolution of the County recites that no harbor lines were established, and if they were it would be one of the considerations given by the Government for the County to take over the bridges; and the resolution of 1910 recites that harbor lines have been established. You can strike that.

Mr. Coakley: We differ from counsel as to these things he has mentioned.

Mr. Toole: You don't differ from me that the resolutions make those recitations?

The Court: You specified the harbor lines as 1909 establishes——

Mr. Toole: I invite your Honor to page 99 of the stipulation of facts—I beg pardon; I said the resolution of 1910; I meant the resolution of 1913. It was a license in 1910. Now, the first paragraph of that resolution says that:

“Whereas, this Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park

(Testimony of Henry S. Pond.)

Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operating and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said [409] bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and——”

That was in the County's own resolution. There was a similar recitation in the first. Now, for the question:

Q. Do the words “harbor lines” appear in Government's Exhibit “B” any place?

A. Yes. The title of this sheet is “Harbor Lines Survey, San Francisco Bay, 1910.”

Q. That is on the title. Outside of the title, does it appear?

A. That is the endorsement. No; that is not the title. It is an endorsement: “The corrections in coordinates of points numbers 76, 77, 78, 79 and 81 in both pierhead and bulkhead lines, and the addition of pierhead line between points numbers 79 and 81 shown thus——” shown as a broken line——“and also U. S. Ed. Mon. No. 29 with reference to point number 81 are hereby approved.”

Q. What is an engineer's definition for “pierhead line”?

(Testimony of Henry S. Pond.)

A. A line as to which pier constructions may be constructed without further consent from the Secretary of War.

Q. What is an engineer's definition of "bulkhead line"?

A. Bulkhead line is a line to which solid fills may be made over navigable waters of the United States without further consent of the Secretary of War—further approval.

Q. Are there any lines on Government's Exhibit No. 2 which are designated in writing as "pierhead" or "bulkhead line"?

Mr. Coakley: The same objection I made before; I object to this question on all grounds heretofore mentioned.

Mr. Toole: Strike the question. I would like to have them marked for identification "C."

The Court: It may be marked "C" For Identification.

(Document marked "Government's Exhibit C For Identification.") [410]

Mr. Toole: Q. Captain Pond, you have in your hand Government's Exhibit "C." Was that exhibit prepared under your supervision and direction?

A. It was.

Mr. Toole: I think counsel will agree that the principal outlines of Government's Exhibit "C" were the same data as the map that has been stipulated as Exhibit 2?

(Testimony of Henry S. Pond.)

Mr. Coakley: I suggest that you ask Captain Pond about that, Mr. Toole; and I think, if it will expedite matters, I would be glad to enter into a stipulation with you that all this line of testimony as to the establishment of harbor lines is being objected to on the ground that it is incompetent, irrelevant and immaterial and these other grounds which I mentioned heretofore in the last objection that I made.

Mr. Toole: Yes.

Mr. Coakley: If you want to stipulate to all this line of testimony of this witness that it is deemed objected to on those grounds?

Mr. Toole: Yes; I will be glad to make that stipulation.

Mr. Coakley: So I won't have to keep repeating it. I'd be glad to refrain from making objections.

Mr. Toole: I am willing to make that stipulation.

The Court: Proceed. If you have any special objections, you may make them.

Mr. Toole: Q. Captain Pond, were the principal outlines on Government's Exhibit "C" prepared from the same data as the map designated Exhibit 2 in the stipulation—Exhibit 2 is the first map?

A. The outline of the Tidal Canal itself was prepared from the same map; but—This is Exhibit "C"?

Q. Yes.

A. —was brought up to date as to its date for streets collateral and the harbor line put on it.

(Testimony of Henry S. Pond.)

Q. Now, Exhibit "C" shows what purport to be bulkhead and pierhead [411] lines between Park and High Streets. From what data were those lines taken on Exhibit "C"?

A. Those data were taken from harbor line Sheet 5,—corrected harbor line Sheet 5, which we previously discussed. To that exhibit, I would like to state that the note on Exhibit "C" is in error—No; it is not in error. That is correct. I understood, at first glance at it, to say it had been taken from that—That is correct.

Q. That is correct? A. Yes.

Mr. Toole: I offer Government's Exhibit "C" in evidence.

Mr. Coakley: To which I object on the ground—on the grounds heretofore, to-wit: Incompetent, irrelevant and immaterial; that this document in particular is not the best evidence; it is not an original record, but it seems to have been made up from other maps or records; it is not even a copy of any particular record,—sort of a composite of a number of records,—and therefore it is not admissible because it is not an official document, not a copy of an official document on file any place; incompetent, irrelevant and immaterial to any issues in this case.

Mr. Toole: Q. Is that a copy from documents which are in your custody and control,—maps?

A. Yes, sir.

Mr. Toole: I may say I am taken somewhat by surprise by that part of your objection, because, as I understood, no technical objections would be made as to the type of evidence.

(Testimony of Henry S. Pond.)

Mr. Coakley: No technical objection to be made to this, assuming that the foundation is laid for the admission of this Sheet 5; but, of course, my general objections which I have heretofore stated I am not relinquishing; but, as to Exhibit "C", here, which is something different from Sheet 5, it includes some of the things in Sheet 5; it also has other things not in Sheet 5; seems to have been made up recently from Sheet 5 and other documents; and I do not know the principle of law upon which such document [412] is admissible.

Mr. Toole: The witness has testified that the principal lines showing the Tidal Canal were taken from the same data of which Exhibit 2 in the stipulation was prepared from, and which both parties have agreed are the outlines of the Tidal Canal.

The Court: I see.

Mr. Toole: The witness has testified that the further data on Government's Exhibit "C" were taken from Sheet 5 to which he testified.

Mr. Coakley: Just a moment. That is exactly correct as to harbor lines; but this map also shows street lines which are not either on the harbor line map or Sheet 5.

Mr. Toole: I think street lines are immaterial.

Mr. Coakley: There are other things such as crayon marks, legends, which do not appear on Sheet 5.

Mr. Toole: They are different colors; that is about the only difference. Counsel complains that

(Testimony of Henry S. Pond.)

the pink color on the map——

Mr. Coakley: That is not all.

Mr. Toole: That is between bulkhead and pier-head line.

The Witness: Yes.

Mr. Coakley: But it has a legend number; that is certainly a statement of fact which is not a part of this Sheet 5 which I understand is a copy of some other documents. Now, as I said before, if the proper foundation for the admission of Sheet 5, which is Exhibit "B" For Identification, is laid, of course, subject to objection as to materiality, it may be admissible; but this other, Exhibit "C," which is not a copy of this Sheet 5, is not admissible, because it is not a duplicate of any original document which is on file any place.

Mr. Toole: Q. Captain Pond, this Government's Exhibit "C" correctly shows the bulkhead and pierhead lines as approved by the [413] Secretary of War on June 3, 1913? A. Yes.

Mr. Coakley: That is objected to on the grounds that it is incompetent, irrelevant and immaterial, and that it is calling for the witness's conclusion as to what the document shows. The document is the best evidence.

Mr. Toole: I just offered it in evidence.

The Court: I will overrule the objection and receive it as Government's Exhibit No. 10.

(Document marked "Government's Exhibit No. 10.")

(Testimony of Henry S. Pond.)

Mr. Toole: Q. Now, have you searched the records of your office to ascertain whether or not harbor lines between Park Street and High Street bridges were established prior to 1913—Subject to the same objection.

A. Yes, I have personally searched them and caused them to be searched by others.

Q. What is the result of that search?

A. We found nothing.

Mr. Coakley: I have special objections to make to that. I object to the question on the ground that it calls for hearsay, to-wit: the witness's version of what the records show; that the records themselves would be the best evidence.

The Court: Sometimes, of course, the records are large. Are there true copies of the records?

The Witness: This is a compilation from various official maps in our office, carefully made.

The Court: Q. In other words, can you distinguish from which maps you received this data?

Mr. Toole: I believe it says, somewhere in the legend. I might say, your Honor, that the Exhibit 2 attached to the stipulation was agreed to by both of us as being correct.

The Court: What do you mean by "Exhibit 2"?

Mr. Toole: Exhibit 2 of the stipulation.

The Court: What is this compared to Exhibit 2? [414]

Mr. Toole: That shows pierhead and bulkhead lines as existing in 1913. Those lines are not on Exhibit 2.

(Testimony of Henry S. Pond.)

The Court: He has gotten this information from some source, not any source that has been stipulated; it has not been received as yet, but he got it from searching records; he got this data from those?

Mr. Toole: That is right.

The Court: Q. And they are on file in your department? A. Yes.

Q. Are you in a position to say from what records you got them—at any rate, you got them from——

A. I cannot say from what particular record each individual item on this map is taken. I can say each particular item on this map is from official records in our office.

Q. And does not vary from them in any way whatsoever? Still, is there any record that is inconsistent in regard to these things?

A. No, sir. Inconsistent, you say?

Q. Yes. In other words, do these things show on all the records? A. Yes, sir.

Q. Wherever they appear?

A. Yes, they are all here on all the records in the office, consistently.

Q. Without any change over the period of years?

A. Oh, no, sir. We have wharves on here which have changed.

Q. Do you know from where those came? The only thing I can say is it is difficult on cross-examination to show whether this is accurate or not.

(Testimony of Henry S. Pond.)

Mr. Toole: My question did not have anything to do with this exhibit at all.

The Court: Will the reporter read the record?
(Record read)

Q. When searching all those, did you check this?

A. That is why I said I personally searched them. I was not quite satisfied with the search of others, so I consequently searched them all personally,—the filed records. [415]

The Court: I will allow the question.

Mr. Toole: Q. What was the result of that search?

Mr. Coakley: Objected to on the ground it is not the best evidence, and calls for the conclusion of the witness, and is incompetent, irrelevant and immaterial.

The Court: I think an expert can take accounts from records where they are voluminous like this—

Q. And they are quite voluminous, aren't they?

A. Yes, sir.

The Court: I think the only way we can do is to have—One of the ways that it could be permitted is to have an expert, like the one who is testifying that says he is an expert and qualifies, prepare such a matter as this, because it would be almost impractical to bring the witness.

Mr. Toole: The witness has produced the only record that he found.

(Testimony of Henry S. Pond.)

The Court: I will allow the question. Proceed.

The Witness: A. There was no record that I could find in our office showing the establishment of harbor lines between Park Street bridge and High Street bridge prior to these lines in 1912, established in 1912.

The Court: Q. As a result of your search?

A. Yes, sir.

Mr. Toole: Q. And approved by the Secretary of War?

A. The Secretary of War, in 1913.

Q. Have you searched the records in your office to ascertain whether any report was made prior to 1913 as to the establishment of harbor lines in the Tidal Canal? A. Yes.

Q. Have you that report?

A. Yes; I have a printed copy.

Q. Will you produce it, please?

A. That '94 report.

Q. Is that document you have in your hand an official record of the Government, particularly of the Engineer's office in San Francisco?

A. This is the annual report, Chief of Engineers, [416] United States Army, Part 1, 1894.

Q. Now, in reference to the establishment of harbor lines in the Tidal Canal prior to 1913, will you turn to the statement in that report that you referred to and read it, please?

Mr. Coakley: Could I see it?

Mr. Toole: I thought we showed you that before.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. This here is what you have reference to? A. Yes.

Q. Anything goes with this?

A. Yes; this endorsement on this map—endorsement data—the same.

Mr. Toole: I take it all this testimony, Mr. Coakley, is subject to your objection?

Mr. Coakley: Yes.

The Witness: A. On page 2506 of the report, under the heading, “Establishment of Harbor Line in Oakland Harbor, California,” it reads:

“United States Engineer Office, San Francisco, Cal., September 20, 1893; General:

“I have the honor to forward, in a separate roll, a tracing exhibiting the harbor lines of Oakland Estuary, recommended by the Board of Engineer Officers constituted by Special Orders No. 51 Headquarters, Corps of Engineers, October 11, 1888, at a session held on the 18th instant. The description of the lines may be found on the tracing by references to established streets in the City of Oakland. Very respectfully, your obedient servant, G. H. Mendell, Colonel, Corps of Engineers.

“To Brig. Gen. Thomas L. Casey, Chief of Engineers, U. S. A.”

Then in brackets, “First Endorsement.” Then it reads:

“Office Chief of Engineers, U. S. Army, September 27, 1893. Respectfully submitted to the Secretary of War without recommendation that the

(Testimony of Henry S. Pond.)

harbor lines proposed by the Board of Engineers and shown in the accompanying tracing be approved. [417]

“It is further recommended that the approval be placed both on this paper and the tracing submitted.

“Thomas Lincoln Casey, Brig. Gen., Chief of Engineers.

“War Department, September 29, 1893. Approved Daniel S. Lamont, Secretary of War.”

Q. That report refers to a map, Captain Pond. Have you that map with you? A. A copy.

Mr. Coakley: Can we have that—what he read from—identified by some number?

The Court: Q. What was this read from?

A. I just designated it in the record.

The volume it is from is an exhibit for identification?

Mr. O'Toole: I have no objection. We can photostat that page if you want it.

The Court: If he wants to have it photostated and substitute the page, what page? 2506?

The Witness: 2506; I read it in the record.

The Court: Q. What is the name of the document?

A. Annual report of the Chief of Engineers, United States Army, 1894, part IV. I think I read it as part I before, and that was in error.

The Court: That will be received as Exhibit “D.”

(Testimony of Henry S. Pond.)

The Witness: May I digress a moment? So far as my own office is concerned, we would like to substitute for this a photostat.

The Court: That is agreeable.

Mr. Toole: That is Government's Exhibit "D"?

The Court: Government's Exhibit "D" For Identification, which is merely that one page, 2506.

Mr. Toole: That would not be Government's exhibit; it is read in the record, as far as the Government is concerned, and I am satisfied.

The Court: I do not see any harm. He asked for it. It is [418] done at his request. I can make it his exhibit.

Mr. Toole: I have no objection to it going in as Government's Exhibit "D."

(Document marked "Government's Exhibit D For Identification.")

Mr. Toole: Q. That report refers to a map. Have you that map or a copy of it with you?

A. The upper map on the board is a copy of the map.

Q. Now, Captain Pond, as an engineer, this map has certain dotted lines——

The Court: This is a new map you are showing?

Mr. Toole: Mark this Government's exhibit.

The Court: "E" For Identification.

(Document marked "Government's Exhibit E For Identification.")

Mr. Toole: Q. This map, Government's Exhibit "E," has dotted lines running from a point close to

(Testimony of Henry S. Pond.)

the right edge down to various streets and to points in the Tidal Canal. Will you explain what those lines are?

A. Well, the report says that the lines are referred to the streets in all this portion to which I am pointing: Dennison Street, Frederick Street, Shasta Avenue and Canal Street. Angle points on the pierhead and bulkhead line are on a line of that street extended and are definite distances from some street intersection, all shown on the map; but when we get east of Canal Street the harbor line has a curve, and thereafter it has reference to the center and radii; the center and those broken lines which you spoke of are the radii of that curve; the center of the curve would be ascertained from the——

Q. What was the purpose of putting those lines in there?

A. To define where the lines are.

Q. What was the purpose of putting these broken lines,—these radii,—on the map? Do they refer to bulkhead or pierhead lines?

A. They refer to pierhead line; and define its position. [419]

Q. Do they show where that pierhead line stops or starts?

A. Yes. The lines of reference stop at a point marked 741.20 feet west of Park Street.

Q. So that the broken line with the mark on it, R-1029.68, has reference to where the bulkhead lines stop?

(Testimony of Henry S. Pond.)

A. No; the bulkhead line stops farther west. The pierhead lines stop——

Q. The pierhead lines stop, and the bulkhead farther west?

A. So it would be interpreted by my office.

The Court: Q. It was interpreted that way by you, also? A. Yes, sir.

Mr. Toole: I offer Government's Exhibit "D" in evidence and ask leave to withdraw it and have photostats or blueprints made for the convenience of Court and counsel.

The Court: I thought you meant this big map?

Mr. Coakley: Subject to the same objection.

The Court: No. 11 in evidence.

(Document marked "Government's Exhibit No. 11.")

(Testimony of Henry S. Pond.)

The Witness: I think I can furnish as many copies of that, full size, as you desire. I am not certain.

Mr. Toole: I will also offer Government's Exhibit "B" as an exhibit in evidence, with the same request.

Mr. Coakley: Subject to the same objection.

The Court: Well, it will be received as Exhibit 12 in evidence,—your exhibit.

(Document marked "Government's Exhibit No. 12.")

(Testimony of Henry S. Pond.)

Mr. Toole: Is this big map,—the large one,—Government's Exhibit 12 or 11?

The Court: The blue one is No. 11.

Mr. Coakley: And the lower one is 12.

Mr. Toole: Q. Is Exhibit 11 the only record you have in your office showing the establishment of harbor lines in the Canal prior [420] to 1913?

A. Yes, the only map record. We have this report.

Mr. Coakley: May I hear that again?

(Record read)

Mr. Toole: And the report refers to——

Mr. Coakley: I object to that question on the same ground, also on the ground it is calling for his conclusion as to what the records of his office show or do not show.

Mr. Toole: The witness testified he had searched his records.

The Court: Q. You have gone over those records? A. Very carefully, in detail.

The Court: I will overrule the objection.

Mr. Toole: Q. When you said, "this report," in answer to my last question, you were referring to Government's Exhibit 11?

A. The report I have just read.

Q. Prior to the establishment of harbor lines between High and Park Street bridges, in 1913, was the Government property between those bridges available for lease?

(Testimony of Henry S. Pond.)

A. I found many instances in the record—several instances where a lease was refused to private property owners; I found an instance where there was an indication that a request of the City of Alameda for the use of frontage on a city street would receive favorable consideration.

Q. What was the situation in regard to the leasing of the Government property between High Street and Park Street bridges after the establishment of harbor lines in 1913?

A. The abutting owners were permitted to use the Government property between the bulkhead and pierhead lines fronting on their private property without lease or without rental, without formality of any kind.

Mr. Toole: Now, referring to Government's Exhibit 10—Is that right, your Honor?

The Court: Yes, that is right. [421]

Mr. Toole: Q. Let me ask you whether it shows anything in regard to the advantage taken by people of that privilege of leasing or building on the Government property after 1913.

A. The dark shaded strips along the Tidal Canal are wharves that were built under that privilege.

Mr. Coakley: Now, this is an addition to the objection I have already made: I object to that statement on the ground it is the conclusion of the witness that this development was all the result of something that he testified to.

(Testimony of Henry S. Pond.)

The Court: Q. In other words, that is what the records reflect that you have seen?

A. I think so. What I intended to testify to is: these have been built by the abutting owners and have been used by them free of charge since that license—that free privilege—was granted. Is that what you intended to bring out?

Mr. Toole: Q. Yes.

The Court: Let us proceed.

Mr. Toole: Q. Captain Pond, Government's Exhibit 10 shows——

A. No; but they are reference pierhead lines.

Q. On Government's Exhibit 10, that line, pierhead, is shown by broken lines?

A. Dash and dot.

Q. And the bulkhead line is shown by broken lines. Now, as an engineer, what is the definition of the situation when the bulkhead and pierhead lines are established? Is that the establishment of harbor lines?

A. Oh, yes. Bulkhead and pier lines together make the harbor system.

Q. Harbor lines? A. Yes.

Q. And on Government's Exhibit 10, marked in pink between the bulkhead and pierhead lines, what is that strip of land?

A. Those are the strips of land owned by the Government which the abutting owners were permitted to use free of charge. [422]

Q. Now, saying that that is the land which was

(Testimony of Henry S. Pond.)

made available to property owners free of charge, is that the property just referred to in the endorsement on Government's Exhibit 9?

A. In the endorsement dated June 3, 1913?

Q. Yes. A. Yes.

Q. Are the harbor lines shown on Government's Exhibit 10 the harbor lines referred to in Government's Exhibit 9?

Mr. Coakley: Just a minute. What is that Exhibit 10?

The Court: That is this one.

Mr. Coakley: The question is here—Let us have that question again.

(Question read)

The Court: How can that be "title sheet"? The same as it appears in the title sheet?

Mr. Toole: I will strike that question. They are all on this and this has been offered in evidence.

Q. Now, the endorsement on Government's Exhibit 9, dated January 20, 1913, referring to the establishment of harbor lines, is that the endorsement that has some reference to the same harbor lines in the Tidal Canal you have testified to, between High Street and Park Street bridges?

A. Yes. The endorsement of January 20, 1913, is the one which established the harbor lines.

Mr. Toole: That is all, your Honor. The Government rests, your Honor.

Mr. Coakley: Now, so that our record will be protected, I move to strike all the testimony on the

(Testimony of Henry S. Pond.)

grounds it is incompetent, irrelevant and immaterial, that it does not involve any of the issues in this case; that it was not a part of any consideration for the assumption of control by the County of Alameda of the bridges, or part of any consideration for any alleged agreement between the County and the United States government; and that any [423] such agreement between the Government and the County was and would be illegal, because it is beyond the powers of the Board of Supervisors and contrary to the Constitution of the State of California, in that any such agreement would constitute a gift of public funds to private corporations, the expenditure of public funds, in excess of the income provided for in any one year.

Now, with reference to the cross-examination of this witness, first, does your Honor want to rule on that motion to strike?

The Court: Is that one of the issues you have here that the whole case is resting on?

Mr. Coakley: This question of harbor lines is related to the issues defined by our stipulation of facts; but I submit, if this testimony that refers to harbor lines is immaterial——

The Court: Would you like to submit that without anything further?

Mr. Coakley: I will submit it.

Mr. Toole: The Government is willing to submit it, your Honor.

The Court: The objection will be overruled.

(Testimony of Henry S. Pond.)

Cross Examination

Mr. Coakley: Q. Now, Captain Pond, the harbor lines were established by virtue of what authority?

A. Section 9 of the River and Harbor Act of March 3, 1899.

Q. That is, United' States statute, Act of Congress? A. Yes.

Q. And under that statute, the establishment of harbor lines is something which is in the discretion of the Secretary of War; isn't that right?

Mr. Toole: That is asking for a legal conclusion of this witness. Section 404 of the United States Code defines what the discretion of the Secretary of War is to establish harbor lines.

The Court: I presume that is calling for his conclusion. I will sustain the objection. [424]

Mr. Coakley: Q. Now, then, the harbor lines which you have testified to, and the pierhead and bulkhead lines to which you have testified, were established pursuant to the authority granted to the Secretary of War under that statute which you have just mentioned; is that right? A. Yes.

Q. And the harbor lines to which you testified on direct examination today were at the time they were established revocable at the will of the Secretary of War, were they not?

Mr. Toole: That is objected to unless the record shows that.

(Testimony of Henry S. Pond.)

Mr. Coakley: You put the witness on as an expert to question him as to the mechanics of the establishment of harbor lines.

Mr. Toole: To the mechanics.

Mr. Coakley: Generally and specifically, yes.

The Court: You put him on to show that he had the right to do certain things. It is more what things were done and in pursuance of certain other acts.

Mr. Toole: It calls for the legal conclusion of this witness.

The Court: I will sustain the objection.

Mr. Coakley: Q. The harbor lines or pierhead and bukhead lines to which you testified specifically this afternoon were changed from time to time, weren't they?

A. They have been changed since establishment, from time to time, yes.

Q. Changed by whom?

A. By the Secretary of War.

Q. Do you know when they were changed?

A. No; I have no—I cannot recite any changes except the one on that map; but there are such.

Q. So there won't be any question about it, the harbor lines to which I am referring in this question, the harbor lines to which you testified as having been established through the Tidal Canal, those harbor lines have been changed from time to time?

A. They have been changed once, I think. [425]

Q. And between 1913 and the present time?

A. Yes.

(Testimony of Henry S. Pond.)

Q. Changed by whom?

A. The Secretary of War.

Q. That is the power which he has to change the pierhead and bulkhead lines?

Mr. Toole: I object to that for the same reason; it calls for his conclusion.

The Court: I sustain the objection.

Mr. Coakley: Q. Now, then, with reference to the establishing of the harbor lines along and through the Tidal Canal, do you know who established those lines,—the person who established those lines? A. Do I personally know the person?

Q. Yes.

Mr. Toole: By “establishing,” do you mean “surveyed it,” or “approved it,” or “submitted it,” to the Secretary of War? All those things are done in establishing harbor lines.

Mr. Coakley: I want to know in detail just exactly what happened then in reference to establishing harbor lines to which he just testified; how they were established, and by whom; and what was done in establishing the line.

The Witness: You want me to recite events leading up to their approval?

Mr. Coakley: Q. Yes.

A. It was not done by my office, it was done by what is now the Sacramento District; so that I am not personally conversant with it except by looking over the records. My office now has the field notes and the original sheets; and we have certain of the

(Testimony of Henry S. Pond.)

correspondence regarding it; and with that backing I could tell you what the record is, as I best know it.

Q. When were those field notes made?

A. 1910, and 1911—I think, one in 1910 and 1911. There may be some in 1912.

Q. Do you know when, in 1910 and 1911?

A. No.

Q. When you say, “field notes,” you mean notes made by a surveyor? [426]

A. Surveyors in the field.

Q. And some time before the making of those field notes, was there any direction from anyone to the surveyor who made those notes and made that survey?

A. Yes; there was a request to the Chief of Engineers for funds to make the survey in order to establish the harbor lines.

Q. When was that done?

A. That, I cannot tell; I do not know the exact date; but it was, of course, prior to the survey.

Q. How long prior?

A. I think that was made in 1909 or 1910; but I won't say which. I have seen a copy of the letter; but I won't say the date.

Q. In these records you say you searched in compiling the data upon which you base your testimony here today, did you have any record or letter showing who directed the person to make this survey and when it happened?

(Testimony of Henry S. Pond.)

A. We have not the original harbor lines board survey; I mean notes. The harbor lines established here were by a board of officers established for the purpose, constituted for the purpose of establishing these harbor lines in San Francisco Bay. We have not those original records of that board.

Q. Where are those original records?

A. We would like to know that. As I told you before, the work was done by the Sacramento District; the Sacramento District transferred to us the maps and the field notes. We are unable to find the field file record, though they told us they have transferred them to us, to our office; we cannot find them any place, and have diligently searched for them.

Q. Were those records to which you have just testified destroyed in the fire of 1906?

A. No. Those are records of 1910, 1911 and 1912.

[427]

Q. Do I understand that these records with reference to the survey and the establishment of pierhead and bulkhead lines, harbor lines, which you have been testifying to today, were made out of the Sacramento District office?

A. Surveys made out of the Sacramento District office, which was then the Second San Francisco District and had its headquarters here in San Francisco.

Q. Those original records you have been unable to find?

(Testimony of Henry S. Pond.)

A. We have been unable to find; and they are unable to find; because we have in our records an estimate of funds necessary to make this survey, as I remember it. I would have to check my memory on that.

Q. Your testimony here is based now upon original records of the survey which would result in the establishment of harbor lines in the Tidal Canal, and field notes, or upon records made from those original records? A. We have the field notes.

Q. Excepting the field notes,—outside of your field notes,—the testimony you have given today was made on the basis of records which were made subsequent?

A. The testimony I have made today as to the harbor lines in the Tidal Canal are based, imposed, on the title sheet we have in our office, so far as establishing these particular records in the Tidal Canal, except a matter of correction of those co-ordinated, which is in our records.

Q. You said something about the direction for the making of the survey and the establishing of harbor lines having taken place in 1909 or 1910. What records did you see in your office, if any, which purport to show such a direction?

A. I saw a request for the funds and a letter regarding the allotment of the funds. The date of either of those letters I do not remember; and I think I said I did not remember when the directions [428] for establishing of those harbor lines came, because I have never seen that particular letter.

(Testimony of Henry S. Pond.)

Mr. Toole: I might state it seems to me counsel is cross-examining on somewhat of a collateral question raised by himself because this witness's testimony as to the establishment of harbor lines was limited to three documents,—a title sheet and these two maps, Government's Exhibits 11 and 12,—and to the report which he read in evidence.

The Court: It was limited to all he could find.

Mr. Coakley: In addition to all the records of the office which he said he searched and examined, as I understand.

The Court: He made that general statement.

The Witness: May I speak up on that matter? I told you I searched the records, yes, as to whether there were any further harbor lines established in that period between that. There is a great deal of correspondence regarding harbor lines. What I searched for particularly was something that would indicate that harbor lines had been established or moved between 1893 and 1913. It is manifestly impossible for me to carry a clear recollection of the dates and contents of every letter I looked at.

The Court: Q. You did not find anything?

A. I did not find anything. I don't claim to be able to testify as to the exact date of every letter I would glance over quickly.

Mr. Toole: I might say we have a good many of these records here, and counsel has spent some two days going over them. If he wants to cross-examine the witness about some particular record, there will be no objection to it.

(Testimony of Henry S. Pond.)

The Court: Let us proceed.

Mr. Coakley: Q. The establishment of harbor lines, laying out of pierhead and bulkhead lines, on this Sheet 5,—did that take place all at the same time; or did the survey take place some time before the laying down of pierhead and bulkhead lines?

[429]

A. The records of our office show that the harbor lines in the Tidal Canal—those harbor lines upstream from Park Street—

Q. Through to San Leandro Bay?

A. Yes—were established from the survey made in connection with the condemnation of the land,—the description,—that there was no special survey made in 1910 and 1911 in that particularity.

Q. So I can clear that up: A survey was made in 1876 or thereabouts, when the condemnation proceedings in United States versus Crooks case took place; is that right?

A. That is my understanding.

Q. And the harbor lines which were established in 1913 were predicated and based upon that survey made in 1870 some time?

A. The harbor lines of 1913 in the Bay, in general, were established on a new survey; but the new survey was not extended through the Tidal Canal.

Q. In other words, the establishment of harbor lines which was made in 1913 was for the entire San Francisco Bay area; is that correct?

(Testimony of Henry S. Pond.)

A. The San Francisco frontage as far south as San Mateo County line; and the Eastbay frontage between Point San Pablo and a point south of Alameda, which I think is shown on that sheet.

Q. And that survey which you have just mentioned was made when? A. 1910 and 1911.

Q. And in the making of that survey, they did not make a survey of the Tidal Canal but used the survey which had been made back in 1870 some time? A. Yes.

Q. And in addition to the lines in the Tidal Canal, they simply layed down on the map pier-heads and bulkheads with reference to the survey made in 1870 sometime?

A. With reference to the Government property line.

Q. Is that right?

A. Yes, if I understand your question. [430]

Q. Do you know who it was who drew the lines on this? A. No.

Q. On the original of which this Exhibit 11 is a copy? A. No.

Q. With reference to the laying down of the pierhead and bulkhead lines through the Tidal Canal as of 1910, 1911 and 1913, whatever year that was, was there any hearing of any kind held?

Mr. Toole: So far as records?

The Witness: A. So far as any records I have seen, as printed, there is no record of the hearing.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. Now, in the establishment of harbor lines, Captain, is it not the practice to have a hearing of some kind so that property owners along the shores where the harbor lines are to be established may have an opportunity to be heard?

A. Yes; but, as I explained before, records of the San Francisco Harbor Lines Board, which would probably be the board that would hold that hearing, is a thing we cannot find.

Q. So far as your records are concerned, you have found nothing to indicate there was any hearing?

A. I did not search particularly from that point of view; and we may find it, if we did so search. What I did search did not reveal any hearing.

Q. So, the establishment of harbor lines through the Canal in this particular instance was accomplished by some member of the United States Army Engineer's office drawing pierhead and bulkhead lines on the map, together with the approval on the map by the Secretary of War; is that right?

A. Well, no—together with the recommendations of the Harbor Line Board as to those particular lines, recommendation from the Chief of Engineers and the Secretary of War, and finally the approval of the Secretary of War.

Q. And in reference to the recommendation of those two Boards, was there any hearing in connection with their recommendations?

(Testimony of Henry S. Pond.)

A. That is a matter of record of the Harbor Lines Board which we [431] cannot find.

The Court: We will take a five-minute recess at this time.

(After Recess)

Mr. Coakley: Q. Now, then, with reference to these harbor lines in and through the Canal, when the harbor lines were changed after 1913 by the Secretary of War, was there any hearing of any kind at the time they were changed?

A. Yes; a public hearing.

Q. With reference to the harbor lines established in the Canal which you say occurred in 1913, do you know exactly when in 1913 it occurred?

A. That is endorsed on the title sheet.

Q. Do you know what appropriation the establishment of those harbor lines was made from?

A. Harbor lines work comes under the heading of examinations, surveys, contingencies, general, which cover harbor lines, anchorages, War Department permits, smaller miscellaneous things which do not pertain to one particular authorized appropriation, but there is not always a separate appropriation.

Q. When was that made?

A. I say there is not a separate appropriation. Those allotments are made out of annual appropriations for river and harbor construction.

Q. Do you know what particular annual appropriation this was made out of?

(Testimony of Henry S. Pond.)

A. No; they are made, normally, annually.

Q. Now, with reference to the leases which you testified to on direct examination, when did the Government first lease any property along the waterfront on the Tidal Canal?

A. Prior to our records which were burned in 1906.

Q. Prior to 1906?

A. Apparently; because our records describe lines then in existence.

Q. Prior to 1906, was the Government leasing—Do you know how [432] long prior to 1906?

A. No; I do not.

Mr. Toole: May I ask, your Honor, that this line of questioning be confined to that portion of the Tidal Canal between High Street and Park Street?

The Court: I think your examination was limited to that area.

Mr. Toole: Yes.

Mr. Coakley: I think his examination was in reference to the entire Tidal Canal.

The Court: I recall him making questions in that form, saying: “What transpired between those two bridges?” If something else crept in, I do not recall. I think he limited it between the two outer bridges,—the portion lying between the two.

Mr. Coakley: Q. Now, Captain, the Tidal Canal which you have been testifying to is not limited to the two bridges? A. No.

The Court: Q. Between the two bridges?

(Testimony of Henry S. Pond.)

A. No, sir; it was not.

Mr. Coakley: Q. And the testimony which you gave this afternoon, when you talked about tidal canals, harbor lines, pierhead lines, leases and so forth, started out some place around the Canal and went through to San Leandro Bay; is that right?

Mr. Toole: Just a moment. I have a copy of my question here, your Honor, which is this: "Prior to the establishment of harbor lines between High Street and Park Street bridges in 1913, was the Government property between those bridges available for lease?"

The Court: I agreed you limited your examination, as far as I recall; and you several times said that very thing,—between those two,—and not on the Fruitvale Bridge.

Mr. Toole: The Fruitvale is in the middle.

The Court: But you have lines that lie between?

Mr. Toole: That is right. I object to any cross-examination in regard to leases and so forth outside of that territory as [433] outside the scope of direct examination.

The Court: I sustain the objection. That was the direct examination; that was his testimony. Of course, I don't know whether during the course of it the witness may have wandered from the area indicated.

Mr. Coakley: I had that impression.

The Court: But I do know all of the interrogatories—Of course, he may have volunteered some-

(Testimony of Henry S. Pond.)

thing—but all interrogatories were limited within that area. I noticed it particularly because I was wondering why he did it.

Mr. Coakley: Is it necessary, under the new rule, to take an exception?

The Court: You cannot expect me to advise you in the law, as I believe you are, asking me legal questions. There are a great many lawyers do that, who think there is no need for the formality of taking an exception. There is the other situation: the judge may, when he comes to decide, disregard anything not proper.

Mr. Coakley: I did not mean to take any advantage of any kind.

The Court: How can you tell whether the judge will not consider, in making his determination, if the record is a proper record? However, if you want to make any objections or exceptions, I would put them in. It is the general thought that, in civil matters, an exception is not used. We still have them in criminal matters.

Mr. Coakley: That was my impression; therefore, I have not been making them.

The Court: I believe you do have to indicate your objection like you do in the state court. There, you say it is incompetent and so forth, if you wish to make an objection.

Mr. Coakley: Q. Now, then, Captain, in connection with the establishment of harbor lines, do leases relating to the leasing of property belonging

(Testimony of Henry S. Pond.)

to the Government along the Tidal Canal, relate [434] to the establishment of harbor lines all separate and distinct?

A. We have no leases.

Q. When you did have leasings, was the lease related to the establishment of harbor lines?

A. I have not studied the lease records sufficient to answer "Yes" or "No." I mean, we went more carefully into harbor line matters; but these old lease agreements I did not study up; I did not know I would be called to discuss them in any detail. We can get the records.

Mr. Toole: Are you trying to secure a legal interpretation as to what a lease is?

Mr. Coakley: With reference to your entire testimony——

The Witness: Mr. Coakley, we have that file of leases here; and you can look at it, if you want. I brought it up in case we wanted it; but I have not studied it. I would prefer not to answer your question; I may be in error unintentionally.

Mr. Coakley: Q. With reference to your entire testimony today about harbor lines, generally speaking, you testified about the mechanics touching harbor lines and things related to harbor lines. Are the leases related to the establishment of harbor lines?

A. I have nothing to do with leases. I have to do with harbor lines. Leases are done by the admin-

(Testimony of Henry S. Pond.)

istrative department of my office; and I have nothing to do with them and cannot answer your question. I don't mean to refuse; —I have nothing to do with them.

Q. With reference to the location or area of the property leased,——

A. I have nothing whatsoever to do with the leases.

The Court: Q. Certain pieces of land have private leases, didn't you say? In other words, on your map? A. Yes, sir.

Q. You know where there were certain leases for private usage; but how they came to secure them, you do not know?

A. I do not know, sir. [435]

Q. All you know: your records show that land was being used for or allowed for private usage?

A. A little more than that. I have a recollection in my head, in glancing over the file in this case, hunting for harbor lines, I would see a lease marked so wide and so long; I didn't happen to see any lease marked to the harbor line; but I skimmed those, because I was looking for harbor lines; and so I do not want to testify as to leases, because I am not well acquainted with them. It is not my business.

Q. You do not know of any leases?

A. None whatsoever. There were no leases at any time that I have been with the United States—

(Testimony of Henry S. Pond.)

Of course, I have only been there since 1914. There was no need of leases after the establishment of these lines.

Mr. Coakley: Q. When you testified to the property made available for leasing, on direct examination, what were you referring to?

A. I was referring to the property that was being made available for use free of any lease or payment of rental or red tape of any kind, as endorsed on here—and has been the practice since I have been in the office.

Mr. Coakley: Q. Before 1909, property was made available by the Government for lease and use for wharves, piers and so forth along the Tidal Canal; isn't that correct?

Mr. Toole: I ask that be limited to the direct examination as to the Tidal Canal between the High and Park Street bridges.

The Court: I sustain the objection. I imagine that is within the scope of his direct examination.

Mr. Coakley: Q. Did I understand you to say there were no leases made after 1909?

Mr. Toole: Just a moment. The same objection.

The Court: He says he doesn't know anything about leases.

Mr. Coakley: Q. Between High Street and Park Street bridges, were any such made after 1909?

A. No leases made after 1913, [436] which was the time in which the Secretary authorized the use

(Testimony of Henry S. Pond.)

of that land by the abutting owners. If there were leases prior to that time, they are not any part of my job and are much earlier than my time, so much so that I do not know anything about them.

Q. At any rate, during your time, so far as you know, there have been no leases made between the High Street and Park Street bridges?

A. During my time, none whatsoever.

Q. That is from——

A. My time in the San Francisco office began September, 1915.

Q. And, so far as you have been able to ascertain from the records, no lease made after 1913 between High and Park Street bridges?

A. Yes—none made.

Q. At any time that any leases may be made by the War Department to anybody along this or any other navigable water area over which the Government has jurisdiction, they would be revocable at the will of the Secretary of War?

Mr. Toole: I object to that as a conclusion of the witness, no proper foundation laid, not within the scope of direct examination.

The Court: I sustain the objection.

Mr. Coakley: Q. With reference to your testimony to the effect that a certain area between the Park Street and the High Street bridges was made available free of charge and without leases, that permission—and it was permission, I take it? Is that right?

(Testimony of Henry S. Pond.)

Mr. Toole: That calls for the conclusion of the witness, too, your Honor. That is shown on the title sheet.

Mr. Coakley: It says "permission" on the title sheet.

Mr. Toole: That is it exactly; the title sheet shows for itself. This witness cannot testify as to whether or not permission given on a title sheet for abutting land owners to build warehouses in that area can be revoked; that is a matter for the powers of the Secretary of War—a power to be conferred by [437] Congress.

The Court: It would be asking for a legal conclusion. I sustain the objection.

Mr. Coakley: This question as to whether or not the making of the area available for use of property owners along the Tidal Canal between High and Park Street bridges without leases, as to whether or not it is revocable at will,—is the objection sustained?

The Court: That is right. It almost looked, though, like it might be a tenancy at will.

Mr. Coakley: Q. Prior to 1913, there were warehouses along the Tidal Canal between Park Street and High Street bridges, wern't there?

Mr. Toole: Just a moment. That is objected to as being outside of the scope of the direct examination.

The Court: I will sustain the objection.

Mr. Coakley: Q. Now, with reference to your

(Testimony of Henry S. Pond.)

testimony that there was no record showing the establishment of harbor lines before 1913—

Mr. Toole: Your Honor, I would like to correct that for the record. The testimony was there were no harbor lines between Park and High Street bridges prior to 1913.

The Court: I presume that he limits his question to that territory.

Mr. Coakley: Q. Calling your attention to this file and particularly to this letter dated March 20, 1914, Captain, is that letter a part of the record of your office with reference to the——

Mr. Toole: I will agree that letter is part of the official records.

Mr. Coakley: Q. ——and these are part of the records which you searched?

A. These records I searched earlier; but they have been in Mr. Toole's office; I have not seen them for quite a while. [438]

Q. Calling your attention to letter dated March 20, 1914, purporting to be signed by Thomas H. Rees, Lieutenant Colonel, Corps of Army Engineers, United States Army; and I ask you whether or not that is what it purports to be: a copy of a letter written by that department.

Mr. Toole: I will agree to it that it is a copy.

The Witness: A. Yes, that is a letter written by Rees, District Engineer at that time.

Mr. Coakley: Q. Particularly with reference to the last paragraph:

(Testimony of Henry S. Pond.)

“Harbor lines through the Canal were established as early as in 1893.”

Mr. Toole: No proper foundation has been laid to read that. What is the purpose of this?

Mr. Coakley: Well, it has reference to the testimony as to whether harbor lines were established through the Canal in 1913.

Mr. Toole: Through that portion between High Street and Park Street?

Mr. Coakley: This is cross-examination.

Mr. Toole: There has been no testimony as to any harbor lines between those bridges prior to 1913.

Mr. Coakley: May I show this to your Honor; this last paragraph here?

The Court: He can read that and say if he has seen that.

Mr. Coakley: Q. Now, Captain, this letter—the latter paragraph of which reads as follows:

“Harbor lines through the Canal were established as early as in 1893. They were reestablished in their present locations by approval of the Secretary of War dated January 20, 1913.”—— is a part of your records in your office? A. Yes. [439]

The Court: Q. But, in speaking of the writing in that regard, you do not know anything about the lines having been——

A. That is why I searched so diligently: to find out what the basis for the statement was. I was unable to find any basis for this statement.

(Testimony of Henry S. Pond.)

Q. You had seen that statement; and, on that basis, had made this investigation? A. Yes.

The Court: Proceed.

Mr. Coakley: Q. Now, then, Captain Pond, as a matter of fact, your records with reference to whether or not harbor lines were established in and through the Tidal Canal between Park Street and High Street bridges may have been destroyed in the fire of San Francisco in 1906?

Mr. Toole: That is calling for a conclusion, it seems to me; it may or may not have been destroyed. There may or may not have been records.

The Court: I think you would better ask if he has any information on it. I think that is so vague as to whether it may or may not have been. The questions you want answered are as to his knowledge.

Mr. Coakley: Q. Is it not possible, Captain, that any records with reference to the establishment of harbor lines in the Canal between these two bridges mentioned were destroyed in the fire of 1906?

A. I think there would have been copies in the printed reports of the Chief of Engineers, because that appeared to be the practice of that day; so I caused and had cause to search independently the printed reports of the Engineer; that is how I found this 1893 one; and I found none.

Q. Records and maps showing the situation with reference to harbor lines, if any, between Park

(Testimony of Henry S. Pond.)

Street and High Street bridges, would be in the Chief of Engineer's office in Washington, D. C., wouldn't [440] they? A. Yes.

Q. Did you communicate with Washington, D. C., and particularly the Chief of Engineer's office there, in connection with the question of whether or not harbor lines were in existence between these two bridges prior to 1913?

A. Not in connection with this case.

Q. Now, then, this map here which is designated as "Oakland Harbor, Harbor Lines Recommended," Exhibit 11, there are these lines here which are projected along the edges of the Tidal Canal. Calling your attention first to this dotted line on each side, what is that line? A. I do not know.

Q. What does it say, on the map, the line is?

A. The map says, "Pierhead Line," on that line in Brooklyn Basin a considerable distance to the west. The line is continuous and goes beyond Park Street.

Q. It goes east of Park Street?

A. East of Park Street; but the report says that the lines have reference to the city streets and all references end west of Park Street.

Q. But in so far as this map is concerned,—the map of September 20, 1893, is concerned, the line designated on this map as "Pierhead Line," does extend easterly of the Park Street bridge, that is, between Park Street bridge and High?

A. Easterly of the Park Street.

(Testimony of Henry S. Pond.)

Q. That would be between Park and High Street bridges? A. Yes.

Q. The same thing holds true with pierhead line which appears on the southerly shore of the Canal? A. Yes.

The Court: I presume we will have to go over to tomorrow the way things are going, because you thought two hours would be ample. I suppose it will be done early tomorrow morning. It is better to go over and have ample time to conclude.

(An adjournment was taken to Friday, March 22, 1940, at 10 a. m.) [441]

Friday, March 22, 1940

The Court: You may proceed with the case on trial,—United States versus the County of Alameda.

HENRY S. POND,

recalled.

Cross Examination

(Continued)

Mr. Coakley: Q. Captain Pond, yesterday you testified with reference to this Exhibit 10. Now, as I understand it, that is a document—rather, it reflects things which are contained in several different maps and documents; is that correct?

A. Yes.

Q. In other words, this is not a copy of any original map which is on file any place; but it does con-

(Testimony of Henry S. Pond.)

tain things which are contained in several different maps and documents? A. Yes.

Q. Now, yesterday you testified with reference to this colored area here, and particularly with reference to the dark shaded area; and that the dark shaded area represented the area taken advantage of by property owners after 1913. Do you remember that testimony?

A. I think I testified that the dark shaded area represented wharves which had been constructed by adjacent, abutting property owners, under that general license, with one exception.

Q. After 1913?

A. There is one exception: the concrete slope—
The Court: Q. Finish your answer.

A. —at the Southern Pacific power house which is designated on the map, "Concrete Slope."

Mr. Coakley: Q. Some of this dark shaded area—rather, the development,—wharves, warehouses or whatever they are, represented by some of that dark shaded area,—took place before 1913?

A. I think my testimony was as between the Park Street and High Street bridges. Isn't that so?

Mr. Toole: That is my recollection. [442]

Mr. Coakley: Q. When you testified about this particular map, the dark shaded area, it represented the advantage taken by property owners after 1913. Now, this map, of course, covers the entire canal?

A. This map covers the entire canal.

(Testimony of Henry S. Pond.)

The Court: Q. Did you mean to only include between the two bridges?

A. My testimony, as to the wharves which took advantage of that license, was only between the two bridges.

Mr. Coakley: Q. There weren't any wharves and warehouses at the time of the few last questions, prior to 1913.

Mr. Toole: I object to that as not proper cross-examination, outside of the scope of the direct.

The Court: I will sustain the objection.

Mr. Coakley: Q. Prior to 1913, the Government had made a lease of waterfront area along the Tidal Canal, about 3200 feet; is that correct?

A. I said, yesterday, I didn't know anything about those leases. I cannot testify about the leases; they are not part of my office duty.

Q. Is it not a fact that, prior to 1913, the Government of the United States was receiving an income of about \$800 a year for the lease of this area along the Tidal Canal there?

Mr. Toole: I object to that as being outside of the scope of the direct examination. I believe the Captain's testimony was confined only to the area between the bridges.

The Court: If it pertains to something between the two bridges, I will allow the question.

Q. Do you know anything about that?

A. I do know, sir, that there were no leases between the bridges.

(Testimony of Henry S. Pond.)

Mr. Toole: Prior to 1913.

The Witness: I know nothing of the leased area of Park Street except so general, so little, I could not testify as to areas that were leased, amount of revenue, or anything about them. They are under the administrative division of our office; and he would have [443] to testify.

Mr. Coakley: Q. As a result of the examination of the records, do you know, Captain, that the Government was receiving, was renting or leasing property along the Tidal Canal at, 25 cents a front foot, and had under lease approximately 3200 feet for which they derived \$800.00 annual income?

Mr. Toole: That is objected to as being outside of the scope of direct examination.

The Court: I will sustain the objection.

Mr. Coakley: Q. Now, then, Captain, is it not a fact that prior to 1913 the Government had a number of leases with reference to waterfront property along the Canal which leases were five-year leases?

Mr. Toole: To which I object for the same reason, and the witness has said that he knows nothing about those leases, and it goes outside of the scope of direct examination.

The Court: He says he doesn't know anything about that.

Q. Isn't that correct?

A. No, sir; I do not know.

The Court: We are getting nowhere. The objection is sustained.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. With reference to this area about which you testified yesterday was made available for use or lease, the area to which you referred, in that respect, was the area between the bulkhead and pierhead lines; is that right?

A. On each side of the creek.

Q. On each side of the Canal?

A. The Canal.

Q. And the bulkhead line to which you testified was the boundary line of the Canal; is that correct?

A. The bulkhead line in the part between Park and High Street was laid on the boundary line as it then was.

Q. And that boundary line was the boundary line of the Canal, as set forth in the decree in the case of United States versus Crooks; isn't that correct? [444]

Mr. Toole: It seems to me that is calling for the conclusion of the witness. I am willing to stipulate.

Mr. Coakley: You are willing to stipulate?

Mr. Toole: Yes.

Mr. Coakley: I will accept the stipulation.

Q. This area to which you referred, was that dry land or was it land which was covered by water?

A. In part, one; and part, the other.

Q. Could you indicate, could you tell us, Captain, how much was dry land and how much was covered by water?

(Testimony of Henry S. Pond.)

A. No; I could not. I would have to refer back to a survey of that date and take the areas off with a clinometer or some instrument; and even then I would only have a high water line, as shown on the map.

Q. Is this the situation, Captain: that the Government, in digging the Canal, did not dig it out to the 400-foot width, but left along the edges, in places, land of varying widths which were inside of that 400-foot depth; is that right?

A. What the Government did was: they dug a channel 300 feet wide on the bottom; but the sides are not vertical; they are sloping,—in some cases, a slight slope; and, in some cases, flatter; so, the deep shoreline would become farther away where there is a flatter slope, due to different material or a different method of excavation, and the shoreline will be near the edge—near the bottom edge of the channel, as it is defined, 300 feet where the slopes stand steeper.

Q. At the top of this Canal, in some instances, it went 400 feet wide; and, in some instances, less than 400 feet? A. Yes.

Q. And as a result of that, there was a strip of a space between the boundary line——

Mr. Toole: I think that is outside of the scope of direct examination.

Mr. Coakley: This is with reference to area.

Mr. Toole: This witness has not gone into enough construction [445] so that he can explain the meaning——

(Testimony of Henry S. Pond.)

The Court: It is all this area between those two bridges, I presume?

Mr. Coakley: Yes, your Honor.

The Court: I will allow the question.

The Witness: A. There are strips of what we call high land on the Government property, if that is what you mean.

Mr. Coakley: Q. In some cases, that high land is inside of the 400-foot width?

A. That is, on the Government property.

Q. In other cases, the water line goes outside of the 400-foot width?

A. Back into private property.

Q. In other words, the line along there of what you call the high land is not absolutely straight; it varies; is that correct?

A. It is not absolutely along the boundary line of the Government property.

Q. Some places, in a few feet; and some places, out a few feet?

A. Yes.

Q. Is that the area to which you referred?

A. No. Any private owner must still have permission to occupy Government land whether submerged or high land, say, the license, for occupancy of the Government land, in order that wharves might be constructed.

Q. The area to which you testified yesterday did not refer to this strip of dry, high land in instances, say, of the 400-foot area, at that time, but refers to all area only between boundary line and pierhead?

(Testimony of Henry S. Pond.)

A. My office has interpreted that to mean that the abutting owner may use all of the Government property while the pierhead was out. That has now been withdrawn, as I testified yesterday—that he could use all of the Government property to the pierhead line, whether it be high land or land under water.

Q. So we can clarify this question: When you testified yesterday, you were referring to the area indicated on the map between the [446] bulkhead line and the pierhead line?

A. Whether that area is high land or submerged land.

Q. Whether or not that is a narrow strip along the boundary line of the Government there along the Canal, of high land, dry land, it has nothing to do with this area which you testified to yesterday, which you say is between pierhead and bulkhead line; is that right?

A. If there is an area of high land on this map, on the Government property and between those two bridges, that is the area of high land generally related to the bulkhead line; even though it may not be excavated, the bulkhead is there.

Q. It will run maybe along high land?

A. It was along high land.

Q. Where the Government did not excavate back to the boundary line? A. Yes, sir.

Q. In other words, where the bulkhead line was on the water; is that right? A. Yes.

(Testimony of Henry S. Pond.)

Q. What I am getting at is this: When you testified that the area colored there, in the map, in red crayon was made available for use, you were referring to the area between the pierhead and the bulkhead line solely? A. Solely.

Q. Not where it did connect with the dry land, which, in some instances, is inside the bulkhead line, and some, outside the bulkhead line?

A. That has no bearing, whether part land or part water.

Q. Now, when the Government, in the establishment of harbor lines on San Francisco Bay Area, in 1913— What would you call that? A project?

A. No; it is just merely the establishment of harbor lines.

Q. In that respect, when the Government did that, at that time they made lines with reference to pierhead and bulkhead lines in other portions of the San Francisco Bay area; is that right?

A. Yes; I testified that yesterday. [447]

Q. In this case, the area between the pierhead and bulkhead lines was likewise made available for use?

Mr. Toole: Just a moment. That is entirely immaterial whether pierhead or bulkhead were established elsewhere on San Francisco Bay.

The Court: I sustain the objection.

Mr. Coakley: Q. With reference to the property made available by the establishment of the harbor lines between the Park Street and High Street

(Testimony of Henry S. Pond.)

bridges, was any of that property between Park Street and High Street bridges leased to anybody at any time?

A. Between Park and High Street bridges?

Q. Since 1913.

A. I cannot testify directly on that. I know that I found a request for a lease, in looking for the harbor line matter, and a reply saying it would not be leased. I found a request from the City of Alameda for some kind of lease—I don't remember exactly what it was—and a letter to the general effect that a request from the City of Alameda might receive favorable consideration; but I was looking for harbor lines, and skimming those things over very quickly.

Q. With reference to the area—By the way, when the harbor lines were established in the Canal, in 1913, they were established through the entire Canal; they weren't limited to Park and High bridges, were they?

A. The pierhead line was not extended the full length of the Canal; only the bulkhead line; but practically so, there was a little bit in San Leandro Bay to which there were no harbor lines.

Q. In the Canal? A. In the Canal.

Q. Outside of that portion which was in the Canal at the San Leandro end of it, were the harbor lines established in 1913 throughout the Canal?

A. Yes.

Q. Up to Brooklyn Basin?

(Testimony of Henry S. Pond.)

A. Throughout the whole Eastbay area [448] from Point San Pablo to a point south of Alameda.

Q. With reference to the property made available between Park Street and High Street bridges, was the method by which it was made available in writing; was that represented by any document such as a lease or license of any kind?

A. The method by which it was made available is the endorsement on the tidal sheet of the harbor line map which we have marked Exhibit 9. There were no papers on each individual occupancy.

Q. Now, then, the conditions under which that property was made available are with the Secretary of War to revoke that availability at any time?

Mr. Toole: That is objected to as calling for a legal conclusion. Exhibit 9, containing the endorsement of the Secretary, contains that, your Honor.

Mr. Coakley: Is it understood, then?

Mr. Toole: Yes; I think that statement speaks for itself.

Mr. Coakley: I didn't hear.

The Court: No; he says the information is contained in Exhibit 9.

Mr. Toole: I made the objection that it calls for his conclusion as to what the Secretary of War could do.

The Court: Here it is, anyway.

Mr. Coakley: Q. With reference to the area between the Park Street and the High Street bridges made available for use as you testified yes-

(Testimony of Henry S. Pond.)

terday, that area was changed by the Secretary of War after 1913; isn't that right?

A. The harbor lines were changed since 1913.

Q. In other words, pierhead and bulkhead lines were changed after 1913?

A. Pierhead; but not bulkhead.

Q. What was that change?

A. The pierhead was altered to coincide with the bulkhead.

Q. That put it back on the 400-foot boundary strip of the Canal? [449]

The Court: Q. In other words, that makes the Canal the full width of the Government strip?

A. Yes.

Mr. Coakley: Q. That would make the bulkhead line the whole length of the Government strip?

Mr. Toole Harbor line.

Mr. Coakley: Q. Harbor lines, in this case; when this change occurred, pierhead and bulkhead lines were the same?

A. The pierhead and bulkhead lines were the same; but they did not exactly coincide with Government property, because Harrison Street, Alameda has since been closed.

Q. With that exception?

A. With that exception and the two bridges, they coincide.

Q. That coincides with the boundary line of the Government ownership there? A. Yes.

Q. So that, now, with reference to any new de-

(Testimony of Henry S. Pond.)

velopment or advantage along there, the property owners cannot build wharves out beyond the pierhead and bulkhead lines which are conterminous with the Government ownership?

Mr. Toole: That calls for a conclusion, et [illegible] owners might get permission from th [illegible]

The Witness: There has been one [illegible]

The Court: What was the witness's statement?

(Record read)

Mr. Coakley: Q. With one exception, my statement on this question is correct; is that right?

A. There have been two requests for permits for wharves out to the former pierhead line since the lines were withdrawn. One request was approved; the other was not.

Q. That one request which was approved was the case of the Hutchinson Stone and Building Material Company?

A. The Hutchinson Company. [450]

Q. They already had two wharves there which had been there for many years?

A. Yes, sir.

Q. By the way, how long had those wharves been there?

A. I do not know.

Q. As a matter of fact, they have been there since 1910.

The Court: He says he doesn't know. You cannot get information of the witness that he does not know.

Mr. Coakley: Q. At any rate, the exception which was made to that ruling was that the area

(Testimony of Henry S. Pond.)

between these two wharves on the Hutchinson property could be filled in with another wharf out to the old pierhead line which was established in 1913?

A. Yes.

Q. In other words, to bring their two wharves together and bringing it out even with the old one; is that right? A. Yes.

Q. Now, the pierhead line along the Tidal Canal between Park Street and High Street bridges was moved back to the bulkhead line in 1929; is that right?

A. I do not know the exact date; but it was moved back recently—about that time.

Q. Now, in establishing harbor lines, is it necessary to have a special survey for that purpose alone?

A. Unless there are adequate, recent surveys, it is necessary.

Q. But where there are adequate surveys existing, then the harbor line can be laid down on the map without making a special survey for that purpose; is that right?

A. A small area of harbor line may be changed without special survey; but it is essential that harbor lines shall show definitely the development of the area at the time and accurately, so it is normally the practice to make a special harbor line survey. We are making such survey now in order to make the general revisions of the San Francisco bay harbor lines.

(Testimony of Henry S. Pond.)

Q. Now, with reference to leasing waterfront: yesterday, you testified generally with reference to harbor lines; and in that respect, in general, the establishment of harbor lines and leasing [451] of waterfront area, where it is Government property, is done for the protection of the waterfront; is that not right?

A. I did not say that the leasing of property was done for the protection.

Q. Let us say the establishment of harbor lines; limit it to that: the new establishment of harbor lines is done for the development and protection of the waterfront?

A. The establishment of harbor lines is done for the protection of navigable waters.

Q. So that abutting property owners cannot build piers, docks or wharves out too far into the channel and thus obstruct navigation?

A. Yes.

Q. And also so that the development within the shoreline will not, in a case where it is in a channel or river, interfere with the tidal prism; is that correct?

A. The interference with tidal prisms is becoming of less and less importance because of the development of efficient dredging. It was once of considerable importance. It is now considered of very little.

Q. Generally speaking, the Government establishes harbor lines so that, in the interest and aid of

(Testimony of Henry S. Pond.)

navigation and commerce, these people will not build up too far and thus obstruct navigation; is that correct? A. Yes.

Redirect Examination

Mr. Toole: Q. Captain Pond, you testified that the pierhead line was moved back to the bulkhead line between the two bridges somewhere around 1929; and your testimony is that docks had been built between the two bridges and the areas marked in dark blue on the map Exhibit——

A. Exhibit 10.

Q. ——but, as prior to the time that the pierhead line was changed. Are those structures still there? A. Yes, sir.

Q. Has the Government caused any of the people to move away or tear them down?

A. The Government has not required that they be taken down. [452]

Q. You testified on cross-examination that the purpose of establishing harbor lines is to protect and aid navigation in the navigable waters, and in aid of navigation. Ordinarily is the Government the owner of the land, as it was in the case here?

A. Not in California.

Q. Now, on the map marked Exhibit 10, there is a shoreline marked where the water evidently comes out beyond the boundary line of Government property. Is that shoreline a high water line?

(Testimony of Henry S. Pond.)

A. The shoreline, as on a map where there is a steep shore, is normally the top of the slope; while the high water line might be some intermediate point between there and the bottom of the channel.

Q. And where the contour of the land between the two bridges was such that it was dry land—a strip of dry land between pier and bulkhead line,—all abutting property owners were allowed to use that dry land as well as land under water out to the pierhead line? A. Yes.

Q. Without cost? A. Without cost.

Q. Captain Pond, on direct examination—with reference first to the map of September 20, 1893, marked Government's Exhibit 11—on direct examination, you testified that the harbor line stopped west of Park Street; and, on cross-examination, you testified that the line designated on the map as a pierhead line extended easterly of Park Street; that is, that would be between the Park Street and High Street bridges. Have you any explanation to clear up your testimony?

A. The report which I read from the Chief of Engineer's annual report states that the line had reference to the street,—Livingston, Dennison Street and Frederick Street; not Shasta Avenue; but the next one,—Canal Street; at each one of those streets, and similarly, in the City of Alameda, there is a distance out to pierhead and bulkhead lines. Then, in Alameda, Stanford Street, at Olivedo Street, at Taylor Street, where there is

(Testimony of Henry S. Pond.)

[453] not an angle point, the bulkhead line—at least, there is a distance out to it; all definite references—all definite references by which the line could be laid out, and west of Park Street. Very clearly, the line which is the pierhead line in Brooklyn Basin is extended beyond the Park Street—immediately east of Park Street bridge; but there is no reference by which a surveyor could locate that line on the water so as to guide a man to construct a wharf; so, I conclude that a draughtsman put it in.

Mr. Coakley: I ask that “I conclude,” from there on be stricken out.

The Court: It may go out.

Mr. Toole: By consent.

Q. As an engineer, in interpreting this map, where would you say that the pierhead line ends?

Mr. Coakley: Object to that on the ground the map speaks for itself; it is the best evidence.

The Court: Unless he can read a map where a layman cannot. In other words, maps show certain things; and sometimes they do not appear to a layman as they do to an expert. You have to have an explanation of certain maps. I presume he can give his opinion.

Mr. Coakley: There is a pierhead line.

The Court: That is, too, what his matter is; that is a matter of explanation, subject to cross-examination how he reads that map, as to what it represents.

The Witness: Shall I answer?

(Testimony of Henry S. Pond.)

The Court: Q. Yes.

A. 741.2 feet west of Park Street.

Mr. Toole: Q. 741.2 feet west of Park Street. Would you make an "X" on the map and indicate that, for the record?

A. There is an arrow there already; there is an arrow point on the map at that point now.

Q. It is rather small, if those maps are reduced and photographed. [454] Now, Captain, as an engineer, how would you interpret that map as showing where the bulkhead lines are?

A. There is no question where the bulkhead lines are on the Alameda side,—Mulberry; and, on the Oakland side, Canal Street. It is very clear.

Mr. Toole: That is all.

Recross Examination

Mr. Coakley: Q. In that respect, I will call your attention, with respect to the testimony you have just given—I will call your attention to a lease between the War Department and Mr. R. R. Thompson dated September 26, 1905, for five years, with reference to a strip of land 400 feet long by 17 feet wide along the southerly side of the Tidal Canal in the vicinity of Park Street—

Mr. Toole: Is that east or west of Park?

Mr. Coakley: That is west of Park.

Q. I will ask you to look at the map attached to that lease, and state whether or not the pier-head line appearing on this lease here goes, as far as the map goes in this case, to-wit, to Park Street.

(Testimony of Henry S. Pond.)

A. Now, I would like to compare this with the map on the board.

The Court: Q. Well, you may do so.

A. On this lease, you have a wharf,—San Francisco Bridge Company Wharf,—and a wharfage area marked, “Proposed Wharf and Pierhead Line,” marked on the outer side of those two wharves. The outer line of those two wharves, where you have got the words “Pierhead Line,” is west of what I consider the pierhead line. There is nothing definite on your map that shows that the pierhead line extends easterly of those two wharves. There is a broken line on both shores. [455]

Mr. Toole: Q. You are referring to the map attached to this lease? A. Yes.

The Court: I suppose you should identify that document.

Mr. Coakley: I will do that, your honor.

The Witness: If the northerly broken line were labelled, “Pierhead Line,” it extends on to the Park Street Bridge; the label “Pierhead” is immediately adjacent to those wharves. That line is not on a broken line; it is on a solid line of wharf.

Mr. Coakley: Q. Isn't it just a coincidence?

The Court: I don't know whether it is a coincidence. He could state what exists as far as the map discloses.

The Witness: But even if this were a correct portrayal of the pierhead line, it would have to be referred carefully to that map.

(Testimony of Henry S. Pond.)

The Court: Q. You do not feel that map continues; there is a variance between it and the map in evidence? A. I do not; no.

Mr. Coakley: I will identify this for the record.

The Court: For identification, Defendants' Exhibit "A."

Mr. Coakley: In fact, I will offer it in evidence at this time.

The Court: No objection?

Mr. Toole: Yes, I object, as being entirely immaterial.

The Court: Under the testimony, I suppose you testify that is a variance?

Mr. Toole: The map has not been connected with anything.

The Court: I will sustain the objection because it is not shown to the Court there is any connection.

Mr. Coakley: This has the seal of the War Department.

Mr. Toole: I so say, it is a map from the War Department.

The Court: The question is whether one map varies from the other. There is no evidence upon which I can receive it in evidence. If you have conflicting evidence, I will receive it.

Mr. Coakley: After all, the documents speak for themselves. [456] There are two lines going through the Park Street bridge on each side. On the south side, the line is marked "Pierhead Line." It is on the same line as the line of wharves here.

(Testimony of Henry S. Pond.)

I submit it is at least a question of fact as to whether or not this is an indication that the pier-head line——

The Court: The difficulty is this: You are speaking as a layman; I view it as a layman; I am not a map expert, although I have had many maps come before me. Here is a man not a layman; he says there is no variance he can discover. How am I going to put it in evidence as being at variance? I am certainly not going to take your statement, as a layman. We have nothing on which to predicate the variance.

Mr. Toole: Of course, no proper foundation has been laid. It has not been shown from what record that was drawn.

Mr. Coakley: I thought you stipulated this is an actual record lease of the War Department; the map is attached to the lease.

Mr. Toole: Yes; but I don't stipulate the map is correct or from what record it was drawn. Some clerk may have drawn it.

The Court: I think you are getting into a question of another point that is not before us. We have not the foundation to put it in, anyway. I imagine, if it was shown to be a true variance, even though it may have been inaccurate on the part of the War Department, we would have to receive it to show the variance. As I understand, this is a lease that has been——

Mr. Coakley: From the War Department.

(Testimony of Henry S. Pond.)

The Court: I don't think you have anything to put in evidence.

Mr. Coakley: Q. Let me ask you: With reference to your testimony, there is a variance between this map and the map on the board?

Mr. Toole: He said there was no variance.

The Witness: A. I said there was nothing to show clearly that there was a variance. [457]

Mr. Coakley: Q. What, in your opinion, as an engineer, is this line here on the north side; what does that represent? A. I don't know.

Mr. Toole: That is objected to; the document is not in evidence.

Mr. Coakley: Q. Calling your attention to Defendants' Exhibit "A,"—the map attached to a lease from the War Department to a man named Thompson, a property owner along the south side of the Canal——

Mr. Toole: I make the objection it is not material at all. The document has not been introduced.

The Court: Q. You cannot read that map to indicate a variance between it and the map in evidence? A. No, sir.

The Court: Where are we getting?

Mr. Coakley: This is cross-examination, your Honor.

The Court: Yes; but you have asked a number of times and he has given you the same answer.

Mr. Coakley: His answer is a conclusion.

(Testimony of Henry S. Pond.)

The Court: He is an expert; and experts can give conclusions. I fail to see the variance. Therefore, the matter of receiving the exhibit at this time in evidence has been denied.

Mr. Toole: And, for that reason, I object to any cross-examination in relation to the exhibit.

The Court: The witness apparently wants to make further deductions. I want to be sure, of course, if there is a variance here. I suppose we are entitled to have it considered.

Q. Tell us, from the stand, have you said anything to the reporter that I did not get?

A. I apologize, your Honor.

Q. You have a perfect right to go by yourself and examine it on the table without the interference of counsel.

A. I am sorry, your Honor. This map has, between broken lines, the words "Tidal Canal Channel 300 feet on bottom." It has no scale on it; but it has U. S. [458] property line on both sides, and that is 400 feet from one side to the other. So, with a ruler, I found this has a scale of 200 feet to the inch, and that the broken lines are 300 feet apart, according to the scale on the map. It is marked "Tidal Canal Channel 300 feet on bottom," although there are broken lines which were used to designate sides and bottom edge of the channel. So, I read this to mean this is the two edges of the 300-foot wide channel,—that broken line. The channel extends to the Park Street bridge.

(Testimony of Henry S. Pond.)

Mr. Coakley: Q. There was a pierhead line in that area?

A. There is marked, on the wharf frontage, "Pierhead Line."

Q. And that was on the same line as the channel line?

A. That was on the same line as the channel line.

Mr. Coakley: That is all.

Further Redirect Examination

Mr. Toole: Q. But where it is marked "Pierhead Line," it is a solid line in front of both wharves? A. Yes.

Q. The rest of the line is a broken line, which designates "Channel"? A. Yes.

Q. And there is no variance between that map which you hold in your hand, attached to the lease, and the map Government's Exhibit 11?

A. No; there is not.

Mr. Coakley: Q. The solid lines indicate wharf front?

A. Indicate wharf front; one in existence and one apparently proposed to be built.

The Court: You may proceed.

Mr. Coakley: That is all; I am through.

The Court: The ruling will stand.

Mr. Coakley: If there is no objection, the people who own the lease would like to have it back or withdrawn.

The Court: Are you through with it now?

(Testimony of Henry S. Pond.)

Mr. Coakley: Yes; I will be glad to substitute a photostatic copy. [459]

The Court: If the other side has no objection to the use, after giving a proper receipt therefor——

Mr. Coakley: May we substitute a photostatic copy?

The Court: You give the clerk a proper receipt, why, I will permit you to take it. Is that all of this witness?

Mr. Toole: That is all the Government has.

Mr. Coakley: That is all.

Mr. Foulds: With the consent of counsel, I will ask that the Captain be made our witness for the Railroad.

The Court: Your witness?

Mr. Foulds: For the purpose of our questions, yes.

The Court: Proceed.

HENRY S. POND,

recalled, for defendant Railway Companies; previously sworn.

Direct Examination

Mr. Foulds: Q. You live in Alameda?

A. I do.

Q. And have been familiar with the Fruitvale Avenue bridge there many, many years?

(Testimony of Henry S. Pond.)

A. Yes, quite a few years.

Q. Would you describe the structure, in a general way, to the Court; that is to say: is there one structure or two structures, one containing a roadway; and one, a street?

A. There is one structure, containing both roadway and railroad track and a pedestrian way, too.

Q. Is it a fact, Captain Pond, that the deck of the bridge is divided; part of it devoted to a railroad track, and one-half or two-thirds devoted to a paved street or right of way?

A. The deck is divided; and the bridge framework is in three trusses, with the railroad between two, and the highway between the center, the middle one and the other side.

Q. The highway connects, on the Oakland side, with Fruitvale Avenue, [460] and, with Alameda, Versailles Avenue?

A. Yes.

Q. And it is an important public street extending from Oakland to Alameda?

A. I am not prepared to testify how important it is. It is a public way.

Q. It has been generally used; one of the prominent crossings across the estuary, is it not?

A. Yes.

Q. And has been for many years?

The Court: Q. It is in continuous use?

A. There has been continuous use a great many years as a public road—a public highway.

(Testimony of Henry S. Pond.)

Mr. Foulds: Q. So far as the structure is concerned, you would have to consider it as one structure with strengthening girders to provide for weight on one side and highway on the other?

A. Yes, sir.

Q. And the whole span itself is upon a single concrete pier?

A. It has a swing bridge which revolves on a center pier.

Q. And that center pier is in the middle of the estuary? A. Yes.

Mr. Toole: May it please the Court and with the consent of counsel, we would like to remove Government's Exhibits 11 and 12 in order to have photostats made.

The Court: If there is no objection.

Mr. Coakley: No, your Honor.

The Court: By giving proper receipt, it will be permitted.

Mr. Coakley: Will you supply us with a couple of copies.

Mr. Toole: Yes. I might say, in connection with the exhibits, that Exhibit "D," which is the annual report of the Corps of Engineers, 1874, was read into the record.

The Court: Only one page,—page 2506.

Mr. Toole: And, by consent of counsel, the record will be sufficient without photostats?

Mr. Coakley: I withdrew the request that they be photostated. [461]

The Court: By stipulation of counsel, that may be withdrawn entirely. Anything further?

Mr. Toole: Not for the Government.

The Court: The Government rests?

Mr. Toole: Yes, your Honor.

The Court: And the other side?

Mr. Coakley: We rest, with reference to the harbor line issue.

The Court: There is another issue?

Mr. Coakley: So far as the harbor line issue, we rest; but, as to the case itself, at this time we offer in evidence the stipulation of facts with reference to the transcript of the proceedings—of Major Mendell's testimony in the proceedings in United States versus Crooks, which offer we made yesterday and which was discussed at some length yesterday.

Mr. Licking: To which offer, if the Court please, we object on the ground that it is entirely immaterial to the issue, and introduced apparently to create a collateral issue; and, further, that it is a request to the Court to go behind the complaint, the findings of fact and the decree, in the case referred to. The complaint in the case referred to states quite clearly—I call your Honor's attention to page 8 of the complaint; it is an exhibit.

The Court: Let me ask you this—but not final on this point: What is your idea about this case? Are you going to submit to the Court without any further showing?

Mr. Licking: We have our brief prepared now and ready for filing now; but, if we have not a ruling on this point——

The Court: I thought you gentlemen were going to put in briefs?

Mr. Licking: That was not my understanding of it, because it is not possible to write a brief intelligently and reserve this particular point.

The Court: You could not get the alternative of it?

Mr. Licking: Not without writing two briefs. [462]

Mr. Coakley: I think a section of the brief could be devoted to the alternative.

Mr. Licking: The Government is perfectly prepared to take the Court's ruling at this time.

The Court: Under the circumstances, you naturally would.

Mr. Licking: I am prepared to argue the matter out now, not at great length.

The Court: Could we do this: could you argue or brief this matter? This is of concern to the County of Alameda, because, naturally, my tendency is to believe that it is not admissible; but I am perfectly willing, so there will be no uncertainty, to have them present their case to see if they can persuade me I am in error. On my determination, of course, if I decide against Alameda, they have an exception to my ruling; and then the matter of the briefing of the problems would be had after that. Do you wish to make a showing or submit that issue?

Mr. Coakley: This is a question which I think should be briefed and argued; I mean the admissibility of this thing. I would like to have an opportunity to both brief it—at least, brief it, if not argue it.

The Court: How soon could you do that? Could that be done, for instance, next Monday—such a short time as that?

Mr. Licking: If the Court please, I think the matter might be argued at the present time; and we will submit our brief within a day after we get counsel's brief.

The Court: It seems to me, if you are going to do any searching of authorities, why give me an argument which may not be based upon a sufficient search? Why not give me the authorities? It is not necessary to appear orally. You are not going to persuade the Court; you are trying to convince him.

Mr. Coakley: I think that can be done. [463]

The Court: Supposing you do that; then comes the final issue. You want this matter determined. The first of April I am due in Sacramento; and will be sitting there for, I think, three weeks; and it is just possible I may go to another jurisdiction after that; it has not been settled; so I may be away several weeks more. If that would interfere with anything here, I do not want to do so. If it is a matter that is submitted, I will carry that with me; my submissions follow me.

Mr. Coakley: If you are going to be in Sacramento, we will be glad to go up there.

The Court: You can argue it there. When do you want to take the matter up, so far as submitting briefs on this issue, so we can get to the main issue?

Mr. Coakley: We would like to give the Court the benefit of our best research. I think, Tuesday or Wednesday, inasmuch as Easter Sunday is upon us.

The Court: I suppose, if you are religiously inclined, you probably won't work until after Easter.

Mr. Coakley: I have three kids to take out Sunday to hunt Easter eggs.

The Court: Put it this way: you will have your briefs in—Do you each want to write a brief separately, or reply?

Mr. Licking: Since I have never seen and am unable to find anything on this particular type of point, I would like to see the County's brief first. I think I can file our brief the next day after receiving the County's brief.

The Court: All right. They will take to and including the 27th to present their brief—March 27th, inclusive; and then you will put yours in, in three days from that?

Mr. Licking: After receipt of that, two days.

The Court: All right. I don't know whether there will be any reply after that or not. One day, I suppose; that will bring it [464] down to the 30th. I suppose you cannot submit it until after that, either one side or the other.

Mr. Licking: I will be in Sacramento and will be glad to submit the matter.

The Court: Then, we can probably arrange for the determination of that on both sides—Could both sides be ready then? Do you want to argue the case?

Mr. Licking: Not until after the briefs are in and your Honor has had an opportunity to consider the briefs.

The Court: I don't mean this point—not on this point.

Mr. Licking: I mean the main issue.

The Court: The whole case. Well, I suppose, if I am there two or three weeks, you can take some day.

Mr. Coakley: Then, as I understand it, we have until March 30th to file briefs in this matter.

The Court: By the 27th; you will either file or Mr. Licking will probably submit it; he will come in on the 28th, if he has no brief from you on the 27th.

Mr. Coakley: He has until the 29th; so the 30th will be his extreme limit?

The Court: Unless something unusual happens. I would not want to say—If it should happen that you run on some very important cases in this matter, by your diligence, I would not want to stop anybody from presenting anything that might be determinative. In the ordinary course of affairs, those things don't happen in ten years; so don't say I won't give you a chance.

Mr. Coakley: After the briefs are in, in this particular issue, then it will stand submitted without further order?

The Court: No; our rules require that either side come in and present it to the Court, which either side can do.

Mr. Licking: I will submit the matter formally in Sacramento. [465]

The Court: For instance, suppose you have until the 27th, and then, if Mr. Licking doesn't reply in two days, you never hear from him, you come in on the 30th and submit it. He doesn't take advantage of it unless he gets time.

Mr. Coakley: After this thing is submitted and determined, then we will submit the briefs on the entire case.

Mr. Licking: Our brief will be ready for submission within a day after your Honor decides this question.

The Court: If this matter is decided, you can make arrangements as to what the briefs are after that. As soon as I decide it and you know the decision, then you have briefs. How much time do you want on the main issue?

Mr. Coakley: Also, then, there is quite a lot of law involved.

The Court: Thirty days? We want to know the time.

Mr. Coakley: I would say fifteen days.

Mr. Licking: As I understand it, the County of Alameda, if we can determine this as expedi-

tiously as possible—the County will continue to operate. The *matter have* been attempting to hasten is for our benefit in that the County has presently only formally agreed to operate the bridge up until the 31st of this month.

The Court: Well, I presume we would have to have an understanding of that pending the decision in the case. Can you speak for the County?

Mr. McCreary: I cannot do so, although I am legal adviser to the Board of Supervisors; they have not decided that matter, but I am informed the matter will come to their attention at the first regular meeting date, which is next Tuesday. As a matter of fact, the understanding is that they will run and operate the bridge until the last day of March.

The Court: The only thing, I think, it should be operated until this matter is determined. The Court may have to take that [466] step for the protection of litigants.

Mr. Licking: I have not the complaint. As your Honor has doubtless observed, it contained originally a request for an alternative writ. However, with the County's agreement to operate to the 31st, there is a general sort of understanding, if we crowded it along, the County would go along with it. We have not requested that writ. Of course, if the County does not, we would feel that we must request a writ.

The Court: The County should do it; whether it goes one way or the other, there is still a question. That thing should be determined legally.

Mr. McCreary: I believe there is a good possibility, by Tuesday afternoon, the 28th, that Mr. Licking will not be asking this Court for any sort of writ. He would have time to do so.

The Court: Then, the main issue, after I determine the other one—the main issue comes up. Will fifteen, fifteen and five be satisfactory?

Mr. Licking: If the Court please, the Government would be satisfied with not to exceed two days after your Honor's ruling on this other question, because we have our opening brief prepared; we could almost waive the matter of filing opening briefs because the evidence is before the Court.

Mr. Coakley: If they want to reduce it to two, we will take ten.

Mr. Licking: If we have to reply, may we have ten days?

The Court: Two, ten and ten.

Mr. Licking: After the decision.

The Court: That is, the main issue. The second of that to run will be upon the determination of the Court of the preliminary issue.

Mr. Coakley: And I suppose at this time the Court would rule upon the admissibility of the corollary,—the other stipulation which represents 1874?

Mr. Licking: If the Court please, it is my understanding that the report—In the first place, it was not offered by the [467] Government as a corollary; it was offered independently, to show what had preceded the initiation of the condemnation ac-

tion; and it was my understanding that the Court did admit that record of 1874,—the report of 1874; that that was in evidence.

The Court: That has been stipulated to.

Mr. Licking: If the Court please, it is stipulated that is the report; that that report was made, but the County did make an objection to the materiality of the report.

Mr. Coakley: Now, I had understood that was admitted in evidence and was subject to a motion to strike.

The Court: I didn't know there was any objection to this report. I thought the objection was to the other.

Mr. Licking: If the Court please, I will take the Court's ruling on that point without briefing or any argument. That is historical of the situation; it defines the situation existing before the condemnation proceedings were entered into. Your Honor will notice it is a report of 1874.

The Court: Are you speaking of—or stipulating facts were offered in evidence by plaintiff subject to defendant County of Alameda as to the materiality?

Mr. Licking: Yes.

The Court: The Court has already received it. It was received when it was put in evidence. Nothing goes in evidence except what is in evidence. That is not an issue before us at the present time.

Mr. Coakley: It was received subject to a motion to strike.

The Court: I suppose you can make a motion to strike. That is already in evidence, as it stands.

Mr. Coakley: I make a motion to strike, for the purpose of the record.

Mr. Licking: I will take a ruling. [468]

The Court: The Court will deny the same. I presume we can adjourn. I thought all the evidence was in,—all defendants were acting together; that is the reason I asked if there was anything else.

Mr. Foulds: I would like to make a very brief showing on behalf of the Railroad.

The Court: Suppose you take the same time that the County takes,—the County of Alameda?

Mr. Foulds: The County, as I understand, is not going to put in any evidence.

Mr. Coakley: The situation is: all the facts are stipulated.

The Court: You want to put in evidence—testimony?

Mr. Foulds: I think, by stipulation, we should be able to put it in.

The Court: Oral testimony?

Mr. Foulds: If it is not stipulated to, I can prove, by oral testimony in five minutes.

The Court: Can you stipulate, you gentlemen? That doesn't affect me. If you can stipulate, take a stipulation to consider this in connection with the other.

Mr. Foulds: I know I can stipulate with the Government.

The Court: Here is the Government, to your left.

Mr. Coakley: Counsel has called this to my attention and it involves legal questions and angles which we have not had an opportunity to consider carefully enough; and I told counsel I could not stipulate to the proposed stipulation.

Mr. Foulds: The only thing is: if I can make a little statement of facts to which the Government agrees, if the County disagrees they can make——

The Court: Make that statement.

Mr. Toole: He can read this stipulation in as a stipulation [469] between the defendant Railroad Companies and the Government.

The Court: He wants it to be brought to bear on the other defendants.

Mr. Foulds: Oh, yes, I do. I think, on further consideration, the County will agree.

Mr. Coakley: At this time, we cannot stipulate. We have discussed the matter.

Mr. Foulds: If it is not stipulated, your Honor, I would like to take the stand.

The Court: There is nothing to prevent you from taking the stand; the only thing is: you cannot argue anything, because you would be arguing without any distinction between attorney and witness, which we look on with disfavor.

Mr. Foulds: Can counsel waive the point of disqualification?

Mr. Coakley: I will.

Mr. Toole: I will.

The Court: The Government, also?

Mr. Toole: The Government, also.

EDWIN J. FOULDS,

called for defendant Railroad Companies; sworn.

The Witness: If the Court please, I am an attorney at law and an officer of the defendant Railroad Companies; my title is "general attorney." I have been connected with them intimately since 1908, in a minor capacity until 1911; since which time, I have been one of their legal advisers and an officer of those companies. I have been, since at least, 1913——

Mr. Coakley: May I interrupt? It is rather difficult, where you relate in a narrative form—I didn't want you to ask questions of yourself; but, if I may interject, you say you are an officer. Designate which company you are an officer of. [470]

The Witness: I am an officer of the defendant Southern Pacific Company, and, as such, have entire jurisdiction, from a legal standpoint, over the subsidiary corporation,—the Central Pacific Railway Company.

Mr. Coakley: Q. In what capacity are you an officer—what official?

A. It is just one of our properties.

Q. Are you president, vice president?

(Testimony of Edwin J. Foulds.)

A. General attorney; that is a position recognized as a position of those companies.

The Court: Q. Legal or as a matter of fact?

A. As a matter of fact.

Q. Attorney in fact?

A. General attorney; which is an official position.

Mr. Coakley: Q. Are you a member of the board of directors?

A. No, sir. I was making a statement—I was about to make, regardless of qualifications, because I am personally familiar with things about which I will testify. These defendants hold no muniment of title whatsoever.

Mr. Coakley: That is a legal conclusion.

The Witness: I am very familiar with the facts.

The Court: I suppose an officer of the corporation can say, “I am familiar with the facts.” Of course, as general counsel—and he speaks of it; he refers as being an officer of the defendant company.

Mr. Coakley: Q. When you use the word “officer,” you are using it in the general sense in that you hold position as general counsel?

A. General attorneys by appointment of the board of directors.

Q. There are other attorneys in the legal department superior to you?

A. And also inferior.

Q. General counsel—what is his name?

(Testimony of Edwin J. Foulds.)

A. The general counsel is Mr. Ben C. Day. [471]

Q. So, when you use the word "officer," you used that in the general sense?

A. The general sense, yes.

Q. And not as in a designated official sense?

The Court: I don't know whether he would be authorized to testify as to title or not——

Q. Have you been authorized or granted that privilege to give this testimony at this time?

A. I am in charge of this case, yes.

Mr. Coakley: Q. Has the board of directors authorized you to relinquish any claim to title of any kind?

A. No, sir. I just want to state my familiarity with the subject and what the facts are.

The Court: Q. The question is whether you have the right to say that the Company has not the title. The only question is, this being a corporation, whether your capacity is such you have a right to make an admission for the corporation.

A. I started to say there are no muniments of title. I am familiar with the records of the Company,—documents, deeds, and everything relating to the subject matter. I have had occasion to investigate many, many times and am very familiar with this.

Mr. Coakley: Q. When you say "no muniment of title," that is a legal question, which would be determined by the documents—the decree and all

(Testimony of Edwin J. Foulds.)

these things. It is a legal conclusion, pure and simple.

The Court: Q. What do you desire to say?

A. My offer of proof is this: that these companies have no title.

Q. There is no issue of title?

A. I want to say they don't own the bridge; we don't claim to. All we have in this litigation is such limited right to use this bridge; we have neither deed, document or license or anything else.

Q. You are making this as an admission against the Company? A. Exactly.

Q. As attorney in the case?

A. I would state that the only ownership we have is in the rails, the track fastenings and the trolley [472] wires by which electric trains operate over the bridge, and the signal by which the bridge is connected with the block signal of the Railroad; in other words, the appurtenances. The ties have actually been laid there by us; and the wires, tracks, spikes and bolts that relate to the tracks, have been put there by us; but we disclaim any interest in any part of the structure itself, and we have no interest therein other than what I have stated. That is the purpose of my offer of testimony.

The Court: I suppose he is stipulating they make that admission against the interests of the Company.

Mr. Coakley: To protect the record, I move to strike the testimony on the ground it is incompe-

(Testimony of Edwin J. Foulds.)

tent, irrelevant and immaterial, mixed up with hearsay and conclusions of law and conclusions of fact, and not the best evidence.

The Court: How do you feel about it?

Mr. Toole: The Government has no objection.

The Witness: I was trying to shorten the testimony.

The Court: Q. Have you made all the statements you wish?

A. All the statements I wish, right now—of course, from a legal standpoint, that we may have some right to continuity of use, by the very fact that this Railroad is interstate and intrastate over the tracks, the only ownership we have is in the rails, the fastenings, and such rights as we have reserved in the decree in *United States versus Crooks*. I can tell the Court we have no other document in our possession that would purport to grant us any other right.

Mr. Coakley: Q. You feel you have a right of way there?

A. The limited right of use which is imposed as to crossings, except we are an important branch of commerce.

Q. You feel, as attorney for the Company, that the Southern Pacific [473] has a right of way across the Fruitvale Bridge, do you not?

A. The right of way and the construction of it would depend upon the construction of the decree.

Q. Now, if the United States government or the

(Testimony of Edwin J. Foulds.)

County of Alameda can take that right away—that right away——

Mr. Toole: I do not know whether it is proper for me to object. Counsel said, “the construction of the right of way would depend upon——”

The Witness: Whatever right we have in that decree; you can read as well as I can.

Mr. Coakley: Q. You believe that right is inalienable and continuous?

A. No; far from it. I say our rights are—and it is reserved by our predecessors in that decree.

Q. Decree in United States versus Crooks?

A. In United States versus Crooks.

Q. The Central and Southern Pacific have been exercising that right all these years since the decree in the Crooks case? A. And are now.

Q. The tracks there are part of that system?

A. General railroad system.

Q. Carrying both intra and interstate as well as local products? A. Yes.

The Court: Q. You never filed an answer?

A. Yes; we set up these facts very fully.

Q. And made this same disclaimer?

A. I think so. As a matter of fact, I have a stipulation of facts.

Q. Don't you know whether it is?

A. I would have to refresh my memory, by looking at it again.

The Court: If the answer has——

Mr. Coakley: I don't think it has. [474]

(Testimony of Edwin J. Foulds.)

The Court: Let us get the answer here.

The Witness: It is filed. It may not be in the file. I have an extra copy with me somewhere.

Mr. Toole: I don't believe, as I remember the answer, that it is a duplication.

The Court: I am asking if the answer disclaims it; that would cover the field entirely.

The Witness: I don't think there is any issue between us at all.

Mr. Coakley: Q. There might be an issue as far as the County is concerned. Is it not a fact that the Southern Pacific and the Central Pacific Railway Companies claim a right to have that bridge operated and maintained?

A. We claim such, yes; that is our construction of the decree in United States against Crooks.

Q. As a matter of fact, you claim that the United States has a legal duty and obligation to maintain, operate and keep in repair the Fruitvale Avenue bridge; is that correct?

A. Yes; that is our construction of the decree in the case of United States versus Crooks.

Q. And it has always been the position and construction of the people whom you represent?

A. That is right.

Q. That the United States government has a duty and an obligation, under the decree in United States versus Crooks, to maintain, operate, keep in repair and replacement, if necessary, the Fruitvale Avenue bridge; is that right?

(Testimony of Edwin J. Foulds.)

A. We make that claim; and that is our construction of the decree.

Q. And that they have that duty and obligation to the Southern Pacific and the Central Pacific Railway Companies? A. That is right.

Q. And anyone having a right of way on that bridge, by virtue of the decree in United States versus Crooks——

A. I think you are going a little far; but, as far as we are [475] concerned, we have those rights in the decree and no other right in the structure.

Q. To simplify the thing, it is your opinion, under the decree in the Crooks case, the Southern Pacific Company, as successor of Central Pacific Railway Company, has a right of way across the bridge there?

A. Yes; that is the way we construe the decree.

Q. In connection with your rights under the Crooks case, the United States government is bound to maintain and keep in repair, operate or replace, if necessary, the Fruitvale Avenue bridge?

A. Yes, sir.

Mr. Toole: One or two questions, Mr. Foulds:

Q. I take it, as far as the Railroad Companies are concerned, it makes no difference as to whether the County or the Railroad operates the bridges?

A. No, sir.

Q. But you look to the United States to do it if the County does not?

(Testimony of Edwin J. Foulds.)

A. We look to the United States directly; but we do not wish to be innocent bystanders or stand idly by. What I did intend to say was: whether the County or the United States operated the bridge——

Q. That is the way I understood you to say. You testified that the Railroad Company owned the tracks, the signal apparatus, the wires, and things of that kind,—the Railroad equipment on the bridge? A. Yes.

Q. Did the Railroad pay for the operation and maintenance of that particular material?

A. For the tracks and wires, furnished and paid for the maintenance, at all times.

Q. With reference to the ties and tracks and that part of the structure, that is all an integral part of the bridge, is it not: the tracks and ties?

A. No; it is not part of the structure of the bridge; it is laid on the bridge.

Q. It is permanently attached by bolts?

A. Now, you are getting [476] into a technicality.

Q. Isn't that a fact?

A. I feel, there, the ties must be fastened to the bridge; otherwise, they would shift.

Q. The tracks, ties and things that carry the trains across are part of the superstructure of the bridge?

A. No, sir; the tracks and ties could be removed, and the bridge would be just as good as it is now.

(Testimony of Edwin J. Foulds.)

Q. Now, the ties and the tracks are attached to the bridge? A. Yes, sir.

Q. And the part of the bridge to which the tracks and ties are attached, and the other apparatus you mentioned, were from time to time maintained by somebody else other than the United States government or the County?

A. The ties have always been maintained by the Railroad Company.

Q. The part of the bridge to which it is attached has been maintained——

A. Oh, yes; the structure of the bridge.

Q. ——maintained by either the United States government or the County? A. Oh, yes.

Q. And you have only maintained the trackage in between the ties?

A. The rails and ties themselves have always been maintained by us.

Mr. Coakley: Q. You were asked by Mr. Toole some questions about your position and the position of your Company with reference to the Government. You are familiar with that as a result of handling this matter for the Southern Pacific Company and the Central Pacific Railway some years?

A. Yes.

Q. And it is a fact, is it not, that the United States government attempted to have the Southern Pacific and Central Railway Companies release them from any obligation to maintain and operate the bridge for the Railroad Companies; is that right?

(Testimony of Edwin J. Foulds.)

A. Well, that particular matter that you are referring to was not handled by me.

Q. You are familiar, by being familiar with the case, to know that [477] happened?

The Court: Are you speaking as counsel or witness?

Mr. Coakley: Both.

The Witness: A. I would accept your statement, and Mr. Toole's, in that respect.

Mr. Coakley: Q. From your familiarity with the papers and documents, as attorney for the Southern Pacific Company—you know that the Government attempted to have the Southern Pacific and the Central Pacific release it from the obligation of maintaining, operating and keeping in repair the Fruitvale bridge, for the Southern Pacific and Central Pacific Railways?

A. Yes.

Q. And that the Southern Pacific and Central Pacific Railways refused to release the United States government, under the decree in the Crooks case, from the obligation to maintain, operate, keep in repair, if necessary, the Fruitvale Avenue bridge? A. That is correct.

Mr. Toole: I am willing to stipulate that the United States attempted to get the consent of the Railroad Companies to have the County substituted for the United States for any duties to the United States; and the Railroad Companies refused.

The Witness: That is correct.

(Testimony of Edwin J. Foulds.)

Mr. Coakley: Q. And also, Mr. Foulds, in addition to the cost of repairing the superstructure of the bridge itself, the operation of the bridge has been paid for, in recent years, by the County of Alameda; is that correct?

A. I assume that is correct. I accept your statement.

Q. At least, the Southern Pacific and the Central Railway did not pay?

A. We did not pay.

Q. Salaries for bridge tender have always been paid by someone other than the Southern Pacific and the Central Railway; and the electric power,—the electricity used in operating and turning [478] the bridge,—that is not paid for by the Southern Pacific or the Central Pacific Railways?

A. That is correct.

Q. It is paid for by the party operating the bridge?

A. That is right.

Q. In recent years, Alameda County; is that right?

A. That is my understanding. In other words, we have not been given possession of the bridge structure itself; possession has been limited to rails, tracks and trolley wires.

The Court: Was that stipulation accepted?

Mr. Toole: The Government accepted it.

The Court: Do you accept the Government stipulation?

Mr. Coakley: I didn't accept any stipulation.

(Testimony of Edwin J. Foulds.)

The Court: It seems to me that, used as a disclaimer, what he has offered there as a witness—if he were making a claim of some sort, there would be a serious issue as to whether he had a right to represent a company in a matter of title; but here, as a disclaimer, he is making certain admissions; as far as admissions against the Company,—a disclaimer as to the rights of his Company,—I don't see why it should not be received here as a witness or a lawyer. Is there any objection to that?

Mr. Licking: I don't see any objection. I think it goes further to the general issue of the case. If ownership of particular physical property in the bridge is at issue, I think the statement of the witness goes to the whole case, not only as interest of the Company; he is proving the facts.

The Court: I think that would be the force of his testimony.

The Witness: As a matter of fact, if the Court please, I wish my statement as to disclaimer to apply to this whole period ever since the tracks are there on the bridge and the bridge has been there.

The Court: I think you have covered the field very well. [479]

Mr. Toole: The Government rests.

Mr. Coakley: So there won't be any misunderstanding, I feel I cannot stipulate to anything along these lines.

The Court: The stipulation was offered; and you apparently looked in his direction and looked away,

and you went in a huddle with your associates, and there was no reply. All I was wondering was if it was a mistake, if you did not recall it was an oversight or ignored the stipulation, or rejected it.

Mr. Coakley: I rejected the stipulation.

The Court: I believe, now, we can adjourn.

[Endorsed]: Reporter's Transcript. Filed Feb. 7, 1941. [480]

[Endorsed]: No. 9748. United States Circuit Court of Appeals for the Ninth Circuit. County of Alameda, (a Body Corporate and Politic, and a Political Subdivision of the State of California), Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 17, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 9748

COUNTY OF ALAMEDA (a Body Corporate and
Politic, and a Political Subdivision of the State
of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT COUNTY OF ALAMEDA'S DES-
IGNATION OF THE PORTIONS OF THE
RECORD ON APPEAL TO BE PRINTED.

The appellant County of Alameda having on the 17th day of January, 1941, taken its appeal from the final judgment made and entered in the above entitled action in favor of the appellee United States of America and against the appellant County of Alameda on the 21st day of October, 1940, by the United States District Court for the Northern District of California, and the parties hereto having designated the portions of the record, proceedings and evidence to be contained in the record on appeal, and the Clerk of the United States District Court for the Northern District of California having under his hand and the seal of the Court transmitted to the above entitled Court a true copy of the matters designated by the parties to be contained in said record on appeal, and the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit having filed said record on appeal

and having entered the same upon a docket of said United States Circuit Court, the appellant County of Alameda does hereby serve upon the appellee United States of America and the defendants Central Pacific Railway Company and Southern Pacific Company and does hereby file with the above entitled Circuit Court a designation of the following portions and pages of said certified record to be contained in the printed record on said appeal:

I.

Page 1 line 1 to page 19 line 14, inclusive, of said certified record on appeal;

Page 27 line 1 to page 29 line 9, inclusive of said certified record on appeal;

Page 35 lines 21 to 27, inclusive, of said certified record on appeal;

Page 54 line 1 to page 163 line 30, inclusive, of said certified record on appeal;

Page 170 lines 5 to 27, inclusive, of said certified record on appeal;

Page 187 lines 17 to 25, inclusive, of said certified record on appeal;

Page 188 of said certified record on appeal;

Page 190 line 1 to page 200 line 9, inclusive, of said certified record on appeal;

Page 206 lines 24 to 30, inclusive, of said certified record on appeal;

Page 225 line 1 to page 230 line 14, inclusive, of said certified record on appeal;

Page 236 lines 29 and 30, inclusive, of said certified record on appeal;

Page 237 of said certified record on appeal; and
Page 239 line 1 to end of said certified record on
appeal.

II

The entire reporter's transcript consisting of pages 1 to 104, inclusive, of the proceedings at the trial of said action on the 21st and 22nd days of March, 1940.

III

Stipulation of Facts with reference to Offer of Evidence by Plaintiff, Subject to objection of Defendant, County of Alameda, as to Materiality, together with Exhibit I—Report of Chief of Engineers AA5 San Antonio Creek, San Francisco Bay, California, attached thereto, introduced in evidence as Plaintiff's Exhibit VIII.

IV

Fifteen (15) copies of each of the following Exhibits (maps) are herewith furnished by the Appellant County of Alameda to be inserted in said printed record on appeal in lieu of being printed, pursuant to stipulation of the parties hereto and the approval of the above entitled Court:

1. Map of Tidal Canal Prepared by United States Army Engineers Office 1882, introduced in evidence as Plaintiff's Exhibit I, attached to Agreed Statement of Facts, and designated therein as Exhibit 1 (b), and numbered in the certified record on appeal as page 189.

2. Map of Tidal Canal as of 1909, introduced in evidence as Plaintiff's Exhibit II, attached to Agreed Statement of Facts, and designated therein

as Exhibit 2, and numbered in the certified record on appeal as page 238.

3. Title Sheet of Maps of San Francisco Bay, California, Showing Harbor Lines Prepared by the San Francisco Harbor Line Board, 1912, introduced in evidence as Plaintiff's Exhibit IX.

4. Map of Tidal Canal, Oakland Harbor, California, Showing Pierhead and Bulkhead Lines Submitted by San Francisco Harbor Line Board June 11, 1912, Approved by Secretary of War June 3, 1913, File Numbered 30-8-35, Sheet 5, introduced in evidence as Plaintiff's Exhibit X.

5. Map of Oakland Harbor showing Harbor Lines Recommended by the Board of Engineer Officers October 11, 1888, introduced in evidence as Plaintiff's Exhibit XI.

6. Map of San Francisco Bay dated April 25, 1918, Showing Pierhead and Bulkhead Lines, introduced in evidence as Plaintiff's Exhibit XII.

Dated: February 17, 1941.

RALPH E. HOYT,

District Attorney in and for the County of Alameda, State of California.

J. F. COAKLEY,

Chief Assistant District Attorney in and for the County of Alameda, State of California.

ROBERT H. McCREARY,

Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER,

Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Appellant, County of Alameda.

Service and receipt of a copy of the attached Appellant County of Alameda's Designation of the Portions of the Record on Appeal to be Printed is hereby admitted this 17th day of February, 1941.

FRANK J. HENNESSY,

United States Attorney.

W. E. LICKING,

Attorney for Plaintiff and Appellee, United States of America.

E. J. FOULDS,

Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH
APPELLANT COUNTY OF ALAMEDA IN-
TENDS TO RELY UPON APPEAL.

The above entitled Court having made and entered a final judgment in the above entitled action in favor of the appellee United States of America and against the appellant County of Alameda on the 21st day of October, 1940, and the appellant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the

Ninth Circuit, and having filed in said Court the record on appeal together with a designation of the portions of said record to be printed, the appellant does hereby serve upon the appellee United States of America and the defendants. Central Pacific Railway Company and Southern Pacific Company, and hereby files with the above entitled Court a concise statement of the following points on which it intends to rely on said appeal:

I.

That the fact set forth in paragraph V of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Tidal Canal was not open to navigation" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The Tidal Canal was navigable in fact".

II.

That the fact set forth in paragraph VII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in *United States v. Crooks, et al.*" is erroneous in that said fact is contrary to the evidence

adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge operated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in *United States v. Crooks, et al.*"

III.

That the facts set forth in "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action are erroneous and insufficient in that from the evidence adduced at the trial and from the facts set forth in the stipulations of facts filed in said action the Court erred in not finding the following additional fact: "In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, *inter alia*, as follows:

‘Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secre-

tary of War may be essential to meet the terms of said transfer.' ”

IV.

That the fact set forth in paragraph XI of “Findings of Fact” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said fact reads as follows: “On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses” is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

“Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating machinery on the said bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

“In 1910 a harbor line survey was made for San Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made.

“In the making of said survey a survey made prior to 1876 for the purpose of the condemnation action of *United States v. Crooks, et al* was used in

the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff's Exhibit 12).

"The endorsement on the "Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912", including Plaintiff's Exhibit 12, read as follows:

'War Department

"Washington, Jany. 20, 1913.

"The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines previously approved for the localities shown thereon.

ROBERT SHAW OLIVER,
Asst. Secretary of War.'

"The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

"The area between pierhead and bulkhead lines as shown on Plaintiff's Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff's Exhibit 9 reading as follows:

‘War Department.

“Washington, June 3, 1913.

‘The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized and permitted to occupy with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE

Asst. Secretary of War.’ ”

V.

That the fact set forth in paragraph XVI of “Findings of Fact” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said fact reads as follows: “On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460”, should have read as follows:

“On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. It was further agreed that should said County subsequently agree to operate said Bridge after March 31, 1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be prejudiced in any way by such operation or by such extension or extensions of time.”

VI.

That the fact set forth in paragraph XVIII of “Findings of Fact” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said fact reads as follows: “The Court, in the said case of *County of Alameda v. Ross*, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909”, is incomplete and erroneous in that said fact is contrary to the evidence ad-

duced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

“The Court, in the said case of *County of Alameda v. Ross*, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909, but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said ‘Petition for Writ of Mandate’ in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted.”

VII.

That the conclusion of law contained in paragraph I of “Conclusions of Law” contained in “Findings of Fact and Conclusions of Law” in the above entitled action, which said conclusion reads as follows: “That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of

War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913'', is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the resolution adopted by the Board of Supervisors of the County of Alameda on December 6, 1909, the license issued by the Secretary of War on September 3, 1910, and the resolution adopted by the Board of Supervisors of said County on November 10, 1913, did not constitute a valid contract and that neither the County of Alameda nor the United States is now or has ever been bound thereby.

VIII.

That the conclusion of law contained in paragraph II of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge'', is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that there

not being now and never having been a valid and existing contract between the United States and the County of Alameda, that the said County of Alameda is not now and never has been obligated to maintain, operate, repair or rebuild said Fruitvale Avenue Bridge.

IX.

That the conclusion of law contained in paragraph III. of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda for the said County to maintain, operate, repair or rebuild the said Fruitvale Avenue Bridge is ultra vires and that the said County of Alameda is not now and never has been estopped to set aside the said alleged contract.

X.

The the conclusion of law contained in paragraph IV of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above

entitled action, which said conclusion reads as follows: "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that neither the County of Alameda nor its Board of Supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XI.

That the conclusion of law contained in paragraph V of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the Congress of the United States has not now and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XII.

That the conclusion of law contained in paragraph VI of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have been gifts of public money or things of value to individuals and municipal or other corporations, prohibited by Section 31 of Article IV of the Constitution of the State of California.

XIII.

That the conclusion of law contained in paragraph VII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of Cali-

fornia forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violates Section 18 of Article XI of the Constitution of the State of California, which said constitutional provision forbids a county's incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year.

XIV.

That the conclusion of law contained in paragraph VIII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for lack of mutuality", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for lack of mutuality.

XV.

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of consideration and that neither of said parties is now or ever has been bound thereby.

XVI.

That the conclusion of law contained in paragraph IX of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for uncertainty", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for uncertainty, both because of the cancellation clause contained therein and because of the ambiguity of its provisions.

XVII.

That the conclusion of law contained in paragraph X of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The courts of the State of California had no jurisdiction to determine substantial rights of

the United States in *County of Alameda vs. Ross*, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the judgment of the District Court of Appeal of the State of California in the matter of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 P. (2d) 460, interpreting the statutes, constitutional provisions and case law of the State of California in regard to the powers and limitations of powers of boards of supervisors and counties and setting forth the substantive law of that State, is binding upon the United States District Court in the present action and that said Court is without authority to interpret said statutes, constitutional provisions and case law or to determine the said substantive law of said State contrary thereto.

XVIII.

That the conclusion of law contained in paragraph XII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in

the stipulations of facts filed in said action and to the law applicable to said facts, and in that the Court should have concluded as a matter of law that the counterclaim of the defendant County of Alameda should be granted and that the United States is obligated to operate, maintain, repair and when necessary, to rebuild or replace said Fruitvale Avenue Bridge and that the County of Alameda is forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge.

XIX.

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda not specifying any time for which said County was bound to maintain, repair and if necessary, replace the Fruitvale Avenue, Park Street and High Street bridges, was contrary to public policy and void and/or that said contract being silent as to the time of its duration was substantially complied with after a reasonable time and/or that said contract having failed to specify the term for which the obligation was to continue, was terminable at the will of either party.

XX.

That the Court erred in not concluding as a matter of law that equity will not enforce perpetual contracts or contracts which are uncertain as to the

length of time of performance or compliance as to their terms.

XXI.

That the Court erred in not concluding as a matter of law that equity should not decree specific performance of said alleged contract which is oppressive, unjust and unconscionable.

XXII.

That the Court erred in admitting over the defendant County of Alameda's objection the report prepared by G. H. Mendell, Major of Engineers, and others, dated at San Francisco, California, February 16, 1874 (Rep. Tr. p. 13).

XXIII.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by the Defendant, County of Alameda," together with Exhibit I attached thereto, which said exhibit contained a Statement of Motion for a New Trial on behalf of Defendant Alfred A. Cohen in the matter of United States v. Crooks (lodged March 21, 1940), which said exhibit set forth the testimony of the witness Major G. H. Mendell given at the time of said motion in the matter of United States v. Crooks, et al., which said testimony explained the report of the said Major Mendell of February 16, 1874, and set forth the details of the construction of said Tidal Canal and purposes for which said Tidal Canal was to be

constructed and particularly the fact that said Tidal Canal was to be navigable.

XXIV.

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda," to the effect that Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with reference to Offer of Evidence by Defendant County of Alameda subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding and during his lifetime was the same party named as defendant in the case of *United States v. Crooks, et al.*, which said Stipulation was lodged in the instant case on the 26th day of March, 1940.

XXI.

That the Court erred in overruling the defendant County of Alameda's motion to strike from the record all testimony of the plaintiff's witness, Henry S. Pond, given on direct examination, which said motion was based on the ground that said evidence was incompetent, irrelevant and immaterial; that it did not involve any of the issues of said case; that it did not establish any consideration for the assumption of control by the County of Alameda of said bridges or any consideration for any alleged agreement between the said County and the United States Government, and that any such purported

agreement between said County and said Government was void and illegal because it was beyond the power of the Board of Supervisors and contrary to the Constitution of the State of California in that it would constitute a gift of public funds to private corporations and an expenditure of public moneys in excess of the income provided for any one year (Rep Tr. pp. 48-49).

XXVI.

The Court erred in limiting the cross-examination of defendant County of Alameda of the plaintiff's witness, Henry S. Pond, in regard to leases by the United States Government of property along the Tidal Canal, to cross-examination concerning leases of lands lying between the High Street and Park Street bridges (Rep. Tr. 58-61).

XXVII.

That the Court erred in ordering that judgment be entered in favor of plaintiff, The United States of America, on "Findings of Fact and Conclusions of Law" for the reason that said "Findings of Fact and Conclusions of Law" are each and every, all and singular contrary to the law and the evidence in the above entitled case and that, therefore, said decree is erroneous and should be set aside and said final judgment should be reversed and that the said United States Circuit Court of Appeals for the Ninth Circuit should order that judgment be entered for defendant and appellant County of Ala-

meda and that said defendant and appellant County of Alameda should have its costs expended herein.

Dated: February 17, 1941.

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California.

J. F. COAKLEY

Chief Assistant District Attor-
ney in and for the County of
Alameda, State of California.

ROBERT H. McCREARY

Assistant District Attorney in
and for the County of Ala-
meda, State of California.

CECIL MOSBACHER

Deputy District Attorney in and
for the County of Alameda,
State of California
Attorneys for Appellant County
of Alameda.

Service and receipt of a copy of the attached
Statement of the Points on which Defendant and
Appellant County of Alameda Intends to Rely on

E. J. FOULDS

Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

RALPH E. HOYT

District Attorney in and for the County of Alameda, State of California.

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Assistant District Attorney in and for the County of Alameda, State of California.

CECIL MOSBACHER

Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Defendant and Appellant County of Alameda.

[Endorsed]: Filed Feb. 18, 1941. Paul P. O'Brien, Clerk.